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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SOVERAIN SOFTWARE)	
)	DOCKET NO. 6:07cv511
-vs-)	
)	Tyler, Texas
)	9:00 a.m.
NEWEGG, INC.)	April 30, 2010

TRANSCRIPT OF TRIAL
MORNING AND AFTERNOON SESSIONS
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE, AND A JURY

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produced by a Computer.

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1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 All right. Before we bring the jury in,
6 let me just tell you, I am granting Plaintiff's JMOL
7 motion on obviousness. I'm denying it as to
8 anticipation.

9 But I think -- I don't think it's a close
10 call on obviousness. I don't think there's sufficient
11 testimony to present an obviousness case to the jury. I
12 think it would be very confusing to them.

13 On anticipation, I'm going to submit that
14 to the jury. I'm not going to grant the JMOL at this
15 time. But I will say it's a very close call. But if
16 the jury doesn't find it, then we don't have to worry
17 about it. If they do find it, then I'll take a closer
18 look at it when we can look at the transcripts and
19 testimony in the case.

20 So with that said, the -- I have -- we've
21 taken out the obviousness part of the charge.

22 Anticipation is still in. We did move
23 the anticipation date, effective -- I'm sorry --
24 effective date up into -- to include some instructions
25 on that. I think it had been in the obviousness section

1 of -- a few sentences.

2 I am not conditioning the damage issue on
3 a finding of invalidity because I want to get all three
4 findings, depending upon what I might do with invalidity
5 in post-verdict motions, if we get to that point, so...

6 MR. ADAMO: Understood, Your Honor.

7 Now, I have not been before Your Honor
8 where you've ruled out something so close to final
9 argument, but -- I should have let you do this, but
10 because I'm a fair fool, I'm going to ask what it is --
11 what can I tell them that you would find acceptable
12 about what happened to obviousness?

13 THE COURT: Well, I just don't think you
14 need to mention it.

15 MR. ADAMO: Understood.

16 Now, the difficulty is, my slide said --
17 I'm going to have to jump over it. I might be able to
18 work with Mr. Gooden to get him to pull the slide, but
19 when my slide set was put together, it was on the
20 assumption that Your Honor --

21 THE COURT: Do y'all need 10 minutes to
22 try to juggle some of that? I'll give it to you, if you
23 need it.

24 MR. ADAMO: If I go through it with
25 Mr. Gooden sitting next to me and say pull --

1 THE COURT: All right. Why don't -- why
2 don't -- why don't we take about -- let me know when
3 you're ready. We'll take about five minutes.

4 Mr. Sayles?

5 MR. SAYLES: May it please the Court. I
6 have one housekeeping matter.

7 THE COURT: All right.

8 MR. SAYLES: In keeping with the Court's
9 procedure, I have marked Defendant's Exhibit List No. 3,
10 which includes Defense Exhibit 516, the stipulations,
11 which was offered and admitted yesterday; and with the
12 Court's permission, I'll tender this list now to the
13 Court.

14 THE COURT: All right. Any objection?

15 MR. ADAMO: No, Your Honor.

16 THE COURT: Be admitted.

17 All right. Any cleanup on the
18 Plaintiff's exhibits, or are we good?

19 All right. Anything else from Newegg?

20 MR. SAYLES: No, Your Honor.

21 THE COURT: All right. We'll just take a
22 five-minute recess while both of you go over your
23 presentations.

24 COURT SECURITY OFFICER: All rise.

25 (Recess.)

1 (Jury out.)

2 COURT SECURITY OFFICER: All rise.

3 THE COURT: Please be seated.

4 MR. ADAMO: Your Honor, thank you for the
5 time. Mr. Gooden and I went through the slides, and I
6 think I got them all out. I erred on the side of, when
7 in doubt, I took it out.

8 THE COURT: All right. Very good.

9 Let's see. Now, I was going to -- oh, I
10 know what I wanted to mention to you.

11 Ms. Ferguson has advised me that there's
12 a few differences between her notes and y'all's final
13 exhibit list that you've turned in.

14 So what I'm going to do is, we're going
15 to mark Plaintiff's and Defendant's final exhibit lists
16 with the annotations, the one that goes to the jury
17 that -- as Plaintiff's Exhibit List Final and
18 Defendant's Exhibit List Final.

19 And I would like agreement that those do
20 constitute all of the exhibits that are in evidence in
21 this case.

22 Plaintiffs so agree?

23 MR. ADAMO: Ms. Craddock is telling me to
24 say yes, Your Honor, so yes.

25 THE COURT: All right. Mr. Sayles?

1 MR. SAYLES: And Mr. Brean is telling me
2 the same thing.

3 THE COURT: You guys are good at
4 dodging -- dodging the responsibility.

5 MR. ADAMO: Your Honor -- Your Honor,
6 can't -- can't you tell from the resemblance between
7 Mr. Sayles and myself, we're working cooperatively?

8 THE COURT: There's no resemblance at the
9 top of your head.

10 [Laughter]

11 THE COURT: All right. Bring the jury
12 in.

13 COURT SECURITY OFFICER: All rise for the
14 jury.

15 THE COURT: Please be seated.

16 (Jury in.)

17 THE COURT: Good morning. Hope y'all had
18 a good evening and are back here ready to go.

19 As you'll recall, Monday you heard
20 opening statements. You've now heard those. You've
21 heard all of the evidence in the case. You've heard
22 the -- you're about to hear the Court's Charge. Then
23 you're going to hear the final arguments this morning,
24 and then you'll be able to begin your deliberations.

25 We do have sandwiches coming in for you

1 today for your lunch, so I'll just advise you of that.

2 If you'll bear with me, I'm going to read
3 through some instructions. I'm going to have the court
4 security officer pass out to you a copy of the Court's
5 Charge.

6 So you'll have all of this. You're
7 welcome to follow along, but please listen to what I say
8 as I go through the Court's Charge. I do get to
9 ad-libbing from time to time, but I think if you'll just
10 listen, it will be helpful to you.

11 Let's start with the verdict form that
12 you've been handed. I'll just cut right to the chase.
13 If you'll look at that two- or three-page form, really
14 you've got three questions to answer in regard to this
15 case.

16 The first question deals with
17 infringement, and it asks: Did Soverain prove by a
18 preponderance of the evidence -- there's that burden of
19 proof standard again -- that Newegg directly infringed
20 or induced infringement of the asserted claims of the
21 '314 and '492 patent?

22 Answer yes or no for each claim and each
23 type of infringement.

24 Then you'll see, for the '314 patent,
25 Claims 35 and 51, and a place for you to answer yes or

1 no as to both direct infringement and inducement.

2 Same thing as to the '492 patent.

3 And I'll have many more instructions to
4 you in a moment about how you go about finding that and
5 what the law is, but just to let you see what questions
6 you're going to be answering.

7 Then Question No. 2: Did Soverain prove
8 by a preponderance of the evidence that Newegg directly
9 infringed the asserted claims of the '639 patent?

10 And there you see the same thing for the
11 '639 patent.

12 The next question deals with invalidity.
13 Did Newegg prove by clear and convincing evidence --
14 there's that standard -- that the claims of the '314
15 patent, the '492 patent, and the '369 (sic) patent are
16 invalid.

17 Really, that should be or.

18 Did Newegg prove by clear and convincing
19 evidence that the claims in the '314, '492, or '639
20 patent -- you answer for each patent and each claim.
21 So the '314 patent claim numbers, '492, and '639 claim
22 numbers.

23 After the invalidity question is a damage
24 question.

25 If you have found that any claim

1 infringed, answer Question 4; otherwise, do not answer
2 Question 4.

3 What sum of money, if paid now in cash,
4 do you find from a preponderance of the evidence would
5 fairly and reasonably compensate Soverain for Newegg's
6 infringement of the following patents: The '314 and/or
7 the '492 and then the '639 patent.

8 Signed this blank day and a place for
9 your jury foreperson to sign.

10 So those are the questions you'll be
11 asked. Now let me go through the Court's Charge and the
12 instructions with you.

13 You've now heard all of the evidence in
14 the case. I'm now going to instruct you on the law that
15 you must apply. It is your duty to follow the law as I
16 give it to you.

17 On the other hand, you, the jury, are the
18 judges of the facts. You're the sole judges of the
19 facts in this case. You should not consider any
20 statement that I may have made during the trial or make
21 in these instructions as any indication whatsoever that
22 I have any opinion about the facts of the case.

23 Again, that is solely your province. You
24 are the judges of those facts.

25 After I instruct you on the law, the

1 attorneys are going to have an opportunity to present
2 their closing arguments to you.

3 Again, the statements and arguments of
4 the attorneys are not evidence. They are not
5 instructions on the law. They are merely what they
6 believe that the evidence shows, and they will try to
7 put the evidence in context for you in light of the
8 instructions that you -- on the law that you will take
9 from me. They're intended on only to assist you.

10 All right. General instructions.
11 A verdict form has been prepared for you. We've been
12 over that. You will take this form to the jury room,
13 and when you've reached a unanimous agreement as to your
14 verdict, you will have your foreperson fill in, date,
15 and sign the form.

16 Answer each question on the verdict form
17 from the facts as you find them. Do not decide who you
18 think should win and then answer the questions
19 accordingly. Your answers and your verdict must be
20 unanimous.

21 In determining whether any fact has been
22 proved in this case, you may, unless otherwise
23 instructed, consider the testimony of all witnesses,
24 regardless of who may have called them, and all exhibits
25 received in evidence, regardless of who may have

1 produced them.

2 When you go to the jury room, you will
3 receive all of the exhibits that have been introduced in
4 this case. They'll be in a box, they'll be numbered,
5 and there will be an index with the numbering and a
6 description of the documents.

7 Now let me visit with you about witness
8 testimony.

9 By the Court allowing testimony or other
10 evidence to be introduced over an objection of an
11 attorney, the Court did not indicate any opinion as to
12 the weight or effect of such evidence.

13 You, again, are the sole judges of the
14 credibility of all witnesses and the weight and effect
15 of all evidence.

16 When the Court sustained an objection to
17 a question addressed to a witness, the jury must
18 disregard the question entirely and may draw no
19 inference from the wording of it or speculate as to what
20 the witness would have testified to if he or she had
21 been permitted to answer the question.

22 Also, at times, I may have ordered that
23 a -- that you disregard or that a question or answer be
24 stricken. You should not consider that testimony.

25 At times during the trial, it was

1 necessary for the Court to visit here at the bench with
2 the lawyers out of your hearing or by calling a recess.

3 We met because often during the trial,
4 something comes up that does not really involve you,
5 mainly questions of law. You should not speculate on
6 what was discussed during such times.

7 In determining the weight to give to the
8 testimony of the witness, you should ask yourself
9 whether there was evidence tending to prove that the
10 witness testified falsely concerning some important fact
11 or whether there was evidence that at some other time
12 the witness said or did something or failed to say or do
13 something that was different from the testimony the
14 witness gave before you during trial.

15 In other words, you're judging the
16 credibility. And in judging that, you can consider many
17 things. You should keep in mind that a simple mistake
18 by a witness does not necessarily mean that the witness
19 was not telling the truth as he or she might remember
20 it, because people may forget things or remember other
21 things inaccurately.

22 So if a witness has made a misstatement
23 or has testified differently at different times, you
24 need to consider whether the misstatement was an
25 intentional falsehood or simply an innocent lapse of

1 memory, and the significance of that may have to do
2 whether it has to do with an important fact in the case
3 or with only some unimportant detail.

4 Now, how to examine the witness, the
5 evidence.

6 Certain testimony in this case has been
7 presented to you through depositions. Again, as I
8 instructed you earlier, a deposition is a sworn,
9 recorded question and answer of the witness taken in
10 advance of trial.

11 In some cases, if the witness cannot be
12 present, the deposition is either read in or played by
13 video. It is still under oath.

14 Deposition testimony is entitled to the
15 same consideration and is to be judged by you as to
16 credibility and weight as if the witness had testified
17 from the witness stand in court.

18 While you should consider only the
19 evidence in this case, you are permitted to draw such
20 reasonable inferences from the testimony and exhibits as
21 you feel are justified in light of common experience.

22 In other words, you may make deductions
23 and reach conclusions that reason and common sense lead
24 you to draw from the facts that have been established by
25 the testimony and evidence in the case.

1 The testimony of a single witness may be
2 sufficient to prove any fact, even if a greater number
3 of witnesses may have testified to the contrary, if,
4 after considering all the other evidence, you believe
5 that single witness.

6 Again, it comes back to you are the sole
7 judges of the facts.

8 Now, there are two types of evidence that
9 you may consider in properly finding the truth as to the
10 facts in this case.

11 The first is what we call direct
12 evidence, such as the testimony of an eyewitness.

13 The other is indirect or circumstantial
14 evidence; that is, the proof of a chain of circumstances
15 that indicates the existence or nonexistence of certain
16 other facts.

17 As a general rule, the law makes no
18 distinction between direct and circumstantial evidence
19 but simply requires that you find the facts from a
20 preponderance of all the evidence, both direct and
21 circumstantial.

22 Now, with regard to expert testimony.
23 When the knowledge of a technical subject matter may be
24 helpful to the jury, a person who has special training
25 or experience in that technical field, which we call an

1 expert witness, is permitted to state his or her opinion
2 on those technical matters.

3 However, you are not required to accept
4 that opinion. As with any other witness, it is up to
5 you to decide whether to rely upon it.

6 In deciding whether to accept or rely
7 upon the opinion of an expert witness, you may consider
8 any bias of the witness, including any bias you may
9 infer from evidence that the expert witness has been or
10 will be paid for reviewing the case and testifying, or
11 from evidence that he or she testifies regularly as an
12 expert witness, and that income from such testimony
13 represents a significant portion of the expert's income.

14 I'm now going to give you a summary of
15 each side's contentions in this case. I will then tell
16 you what each side must prove to win on these issues.

17 In this case, the Plaintiff, Soverain,
18 contends that the Defendant, Newegg, uses technology for
19 its websites that infringes Claims 35 and 51 of the '314
20 patent; Claims 17, 41, and 61 of the '492 patent; and
21 Claims 60 and 79 of the '639 patent. Soverain asks you
22 to award damages for this infringement.

23 Newegg contends that it does not infringe
24 Soverain's patent and that Soverain's patents are
25 invalid. Newegg asks that you deny Soverain any

1 damages.

2 Now, with regard to the burdens of proof,
3 I instructed you about these at the beginning of the
4 case, and I'm going to instruct you about them again
5 because they're important.

6 Soverain has the burden of proving
7 infringement by a preponderance of the evidence.

8 Preponderance of the evidence means
9 evidence that persuades you that a claim is more likely
10 true than not true.

11 In determining whether any fact has been
12 proved by a preponderance of the evidence, you may,
13 unless otherwise instructed, consider the stipulations,
14 the testimony of the -- of all witnesses, regardless of
15 who may have called them, and all exhibits received in
16 evidence, regardless of who may have produced them.

17 It will be your job to determine whether
18 Soverain has met its burden of proving that infringement
19 of the asserted patent claims is more likely true than
20 not true.

21 Now, Newegg bears the burden of proving
22 invalidity by the clear and convincing evidence
23 standard.

24 Proof by the clear and convincing
25 evidence standard is a greater burden of proof than

1 proof by a preponderance of the evidence, but it is less
2 than the burden of proof that you may have heard about
3 in criminal cases: Beyond a reasonable doubt.

4 Clear and convincing evidence is evidence
5 that produces an abiding conviction that the truth of a
6 factual contention is highly probable.

7 In determining whether any fact has been
8 shown by clear and convincing evidence, you may, unless
9 otherwise instructed, consider the stipulations, the
10 testimony of all witnesses, regardless of who may have
11 called them, and all exhibits received in evidence,
12 regardless of who may have produced them.

13 It will be your job to determine whether
14 Newegg has met its burden of proving the invalidity of
15 the '314, '492, and '639 patent claims.

16 Now let's talk about the claims of the
17 patents-in-suit.

18 As I told you at the beginning of the
19 trial, the claims of a patent are the numbered sentences
20 at the end of the patent. The claims describe the
21 invention made by the inventor and describe what the
22 patent owner owns and what the patent owner may prevent
23 others from doing.

24 Claims may describe products, such as
25 machines or chemical compounds, or processes for making

1 or using a product. Claims are usually divided into
2 parts or steps called elements or limitations.

3 For example, a claim that covers the
4 invention of a table may recite the tabletop, four legs,
5 and the glue that secures the legs on the top. The
6 tabletop, legs, and glue are each a separate element of
7 the claim.

8 Construction of the patent claims.

9 In deciding whether or not the accused
10 technology infringes the patent, the first step is to
11 understand the meaning of the words used in the patent
12 claims.

13 It is my job as Judge to determine
14 whether the patent -- to determine -- it is my job as
15 Judge to determine what the patent claims mean and to
16 instruct you about that meaning.

17 You must accept the meanings I give you
18 and use those meanings when you decide whether or not
19 the patent claims are infringed and whether or not the
20 patents are invalid.

21 Before I instruct you about the meaning
22 of the words of the claims, I will explain to you the
23 different types of claims that are at issue in this
24 case.

25 Before I do that, though, let me suggest

1 that you turn to -- let's see. Do they have the chart
2 as an exhibit? Yes.

3 MR. ADAMO: They do, Your Honor.

4 THE COURT: Exhibit A to the charge will
5 be on Page -- starts over on Page 22 of the charge. If
6 you'll flip over there.

7 There you will see in the left-hand
8 column are various terms that are used in the patent
9 claims. And you probably heard some of these testified
10 about during the trial.

11 And as I told you earlier, at some point
12 prior going to trial, the parties reviewed the claims.

13 When they had a disagreement over what a
14 particular term meant, they would come to me, and we had
15 a hearing, usually a three- or four-hour hearing.

16 They filed briefs on the law, on the
17 patent, and I then construed what the meaning of those
18 terms were in light of the specification of the patent
19 and the meaning of the patent. So you're bound by these
20 terms.

21 For example, a statement URL, and then
22 you see the Court's construction, a URL concerning a
23 statement.

24 Computer, what that is: A functional
25 unit that can perform substantial computation, including

1 numerous arithmetic operations or logic operations
2 without human intervention.

3 Connected to: Having a link to, to send
4 or receive data.

5 Database: A collection of logically
6 related data stored together in one or more computerized
7 files.

8 And it goes on for several pages. I'm
9 not going to the read them all, but I would commend them
10 to your reading and your review as you do your
11 deliberations.

12 The attorneys will also, in their closing
13 argument, point out to you any of these definitions that
14 they think are of particular importance to you in
15 reaching your verdict.

16 Now, I'm going to explain to you the
17 types of claims that are at issue in this case. It may
18 be helpful to refer to copies of the '314, '492, and
19 '639 patents that you have in year notebooks as I
20 discuss the claims at issue here.

21 First are independent and dependent
22 claims. We went over this earlier. I'll mention it
23 again.

24 Patent claims may exist in two forms
25 referred to as independent claims and dependent claims.

1 An independent claim does not refer to
2 any other claim of the patent. It is not necessary to
3 look at any other claim to determine what an independent
4 claim covers. Claim 17 of the '492 patent is an
5 independent claim.

6 A dependent claim refers to at least one
7 other claim in the patent. A dependent claim includes
8 each of the claim elements of the other claim to which
9 it refers, as well as the additional elements recited in
10 the dependent claim.

11 In this way, the dependent claim is said
12 to depend on the other claim. To determine what a
13 dependent claim covers, it is necessary to look both at
14 the dependent claim and the independent claim to which
15 it refers.

16 So if you've got an independent claim,
17 you just look at the elements of that claim.

18 If you have a dependent claim, you look
19 at the elements of that claim, plus the elements of the
20 claim it refers to, okay?

21 Everybody with me?

22 Okay. All right. When analyzing the
23 validity and alleged infringement of any dependent
24 claim, you must consider all limitations of both the
25 dependent claim and independent claim for which it

1 depends.

2 And I think I've been over that.

3 Now let's skip down to the interpretation
4 of claims.

5 In deciding whether or not the accused
6 technology does or does not infringe a patent claim --
7 well, this is Appendix A. I've been over that as well.
8 I've already told you about the Court's claim
9 construction.

10 Paragraph 3.4 is a glossary of patent
11 terms. A glossary of patent terms is contained in
12 Appendix B to this charge.

13 If you'll turn back to Appendix B, which
14 begins on Page 26, is the glossary of patent terms, and
15 that's another list of definitions for you there.

16 I would direct your attention over to
17 Page 27. One definition that you'll -- or word that
18 you'll hear me mention several times that I think is
19 worth me going over with you -- and I would commend all
20 of these glossary of terms to you for your reading and
21 consideration in reaching your verdict.

22 But one of ordinary skill in the art,
23 you'll hear many references to one of ordinary skill in
24 the art or as one of ordinary skill in the art would
25 know it.

1 Here I define what that is.

2 From time to time, I'll refer to a
3 hypothetical person of ordinary skill in the art or a
4 person of ordinary skill in the field. This
5 hypothetical person is presumed to be aware of all the
6 prior art and knowledge that existed in the field during
7 the relevant time period.

8 The skill of the actual inventor and
9 experts is irrelevant because they may possess that
10 something that distinguishes them workers of ordinary
11 skill in the art.

12 Factors to consider in determining the
13 level of ordinary skill in the art include the
14 educational level and experience of people working in
15 the art, the types of problems faced by workers in the
16 art, and the solutions found to those problems and the
17 sophistication of the technology in the field.

18 All right. Let's go back to Page 7, and
19 I'm now going to discuss infringement with you.

20 Any person or business entity that,
21 without the patent owner's permission, makes, uses,
22 sells, or offers to sell a device or practices a method
23 that is covered by at least one claim of a patent before
24 the patent expires, infringes the patent.

25 A patent owner has the right to stop

1 others from infringing the patent claims during the life
2 of the patent.

3 In this case, Soverain asserts that
4 Newegg has infringed the patents-in-suit. Soverain has
5 the burden of proving infringement by a preponderance of
6 the evidence.

7 Only the claims of a patent can be
8 infringed. You must consider each claim individually.
9 You must compare each of the asserted claims, as I have
10 defined them, to the accused methods and systems used by
11 Newegg's websites and determine whether or not there is
12 infringement.

13 You must not compare the accused systems
14 or methods with any specific example set out in the
15 patent.

16 You compare it to the claims set forth in
17 the patent, the claims that are at issue in this case.

18 Soverain has alleged that Newegg
19 infringes these -- the asserted claims both directly and
20 indirectly. I will now explain each of the types of
21 infringement in more detail.

22 So we've got infringement and then two
23 types, direct and indirect, underneath it.

24 A patent claim is directly infringed only
25 if the accused system or method includes each and every

1 element in that patent claim.

2 If you find that the accused system or
3 method includes each element or step of the claim, then
4 the system or method infringes the claim even if such
5 system or method contains additional elements or steps
6 that are not recited in the claim.

7 If the accused system or method does not
8 contain one or more of the limitations recited in a
9 claim, then that system or method does not directly
10 infringe that claim.

11 An accused system infringes the claim if
12 it is reasonably capable of satisfying the claim
13 elements, even though it may also be capable of
14 non-infringing modes of operation.

15 Direct infringement requires a party to
16 perform or use each and every step of a claim method
17 literally or under the Doctrine of Equivalents.

18 Where no one party performs all the steps
19 of a claim method, but multiple parties combine to
20 perform every step of the claim method, that claim will
21 nevertheless be directly infringed if one party
22 exercises control or direction over the entire method so
23 that every step is attributable to the controlling
24 party.

25 Mere arm's-length cooperation between the

1 parties is not enough to establish direct infringement.

2 A person can directly infringe a patent
3 without knowing that what it is doing is an infringement
4 of the patent.

5 It may also directly infringe even
6 though, in good faith, it believes that what it is doing
7 is not an infringement of any patent and even if it did
8 not know of the patent. Infringement does not require
9 proof that the person copied a product or the patent.

10 A claim limitation may be directly
11 infringed in one of two ways: Either literally or under
12 the Doctrine of Equivalents.

13 So we've got direct infringement and
14 indirect infringement.

15 Under direct infringement, it can be
16 proven either by literal infringement or the Doctrine of
17 Equivalents. And I'm going to describe each of those to
18 you.

19 A claim limitation is literally infringed
20 and is literally met if it exists in the accused system
21 or method just as it is described in the claim language,
22 either as I have explained that language to you, or if I
23 did not explain it, as it would be understood by one of
24 skill in the art.

25 Again, that's that ordinary person --

1 order skill in the art.

2 So that's literal infringement. In other
3 words, it literally exists in the accused system or
4 method as described in the -- in the claim language.

5 Next is the Doctrine of Equivalents.
6 This is another way of proving direct infringement.

7 A claim limitation is present in an
8 accused system or method under the Doctrine of
9 Equivalents if the differences between the claim
10 limitation and a comparable element of the accused
11 system or method are insubstantial.

12 One way to determine whether a difference
13 is insubstantial is to look at whether the element of
14 the accused system or method performs substantially the
15 same function in substantially the same way to achieve
16 substantially the same result as the element recited in
17 the patent claim.

18 You may also consider whether, at the
19 time of the alleged infringement, a person having
20 ordinary skill in the field of the technology of the
21 patent would have known of the interchangeability of the
22 alternative feature and the unmet requirement of the
23 claim.

24 The interchangeability of the two
25 features must have been known to persons of ordinary

1 skill in the field of technology at the time the
2 infringement began.

3 Thus, the inventor need not have foreseen
4 and the patent need not describe all potential
5 equivalents to the invention covered by the claims.

6 Also, slight changes in technique or
7 improvement made possible by technology developed after
8 the patent application is filed may still be considered
9 equivalent for the purposes of the Doctrine of
10 Equivalents.

11 Now, next is active inducement of
12 infringement. This would be your indirect infringement.

13 So you've got direct infringement, either
14 literally or by the Doctrine of Equivalents.

15 Now we're going to talk about indirect
16 infringement by inducement.

17 Soverain alleges that Newegg is also
18 liable for infringement by actively inducing others to
19 directly infringe Claims 35 and 51 of the '314 patent
20 and Claims 17, 41, and 61 of the '492 patent.

21 As with direct infringement, you must
22 determine whether there has been active inducement on a
23 claim-by-claim basis.

24 A person is liable for active inducement
25 of a claim only if:

1 (1) the person takes action during the
2 time the patent is enforced which encourages acts by
3 someone else;

4 (2) and the encouraged acts constitute
5 direct infringement of that claim;

6 (3) and the person is aware of the patent
7 and knows or should have known that the encouraged
8 act -- acts constitute infringement of that patent;

9 (4) and the person has an intent to cause
10 the encouraged acts;

11 (5) and the encouraged acts are actually
12 carried out by someone else.

13 In order to prove active inducement,
14 Sovereign must prove that each of these requirements is
15 met by a preponderance of the evidence.

16 Intent to cause the acts that constitute
17 direct infringement may be demonstrated by evidence of
18 active steps taken to encourage direct infringement,
19 such as advertising an infringing use or instructing how
20 to engage in an infringing use.

21 In order to establish active inducement
22 of infringement, it is not sufficient that Newegg was
23 aware of the acts that allegedly constitute the direct
24 infringement; rather, you must find specifically that
25 Newegg intended to cause the acts that constitute the

1 direct infringement and must have known or should have
2 known that its action would cause the direct
3 infringement.

4 If you do not find that Newegg
5 specifically meets these intent requirements, then you
6 must find that Newegg has not actively induced the
7 alleged infringement.

8 So back to our charge, the first issue,
9 infringement, direct infringement, it can be proven
10 either literally or under the Doctrine of Equivalents;
11 and then induced infringement is the indirect
12 infringement that I've just described for you, active
13 inducement of infringement.

14 All right. That's all of the
15 instructions with regard to the first question,
16 infringement. We now turn to the defense of invalidity.

17 Newegg has changed -- Newegg has
18 challenged the validity of the '314, '492, and '639
19 patents.

20 Newegg must prove that a patent claim is
21 invalid by -- and here's that standard -- the clear and
22 convincing evidence standard of proof.

23 An issued patent that is issued by the
24 United States Patent & Trademark Office is accorded a
25 presumption of validity based on the fact that the

1 Patent Office correctly issued the patent.

2 The effective filing date of an
3 application is generally the date that the application
4 was actually filed at the U.S. Patent Office, but in
5 instances with continuation applications --

6 JUROR: I have a question. I'm sorry.

7 THE COURT: Yes.

8 JUROR: Can we make notes?

9 THE COURT: Sure. Yeah. You can make
10 notes on it, uh-huh.

11 MR. ADAMO: Can we approach?

12 THE COURT: Yes.

13 (Bench conference off the record.)

14 THE COURT: All right, Ladies and
15 Gentlemen. One thing that the attorneys have pointed
16 out to me, with regard to the Doctrine of Equivalents --
17 that's the second way that you can -- all right.

18 Under direct infringement, you can prove
19 it either literally or by the Doctrine of Equivalents.
20 And then as to inducement, it can also be proven by the
21 Doctrine of Equivalents, okay?

22 So that's just an oral instruction I'm
23 giving you. So that Doctrine of Equivalents applies to
24 both direct infringement and induced infringement.

25 All right. Now, continuing on with

1 invalidity, I was telling you about the effective filing
2 date on Page 11.

3 The effective filing date of an
4 application is generally the date that the application
5 was actually filed at the U.S. Patent Office, but in
6 instances with continuation applications, the effective
7 filing date can be earlier.

8 A continuation application is an
9 application filed during the pendency of a parent
10 application that claims inventions that were disclosed
11 in the parent application and also claims the priority
12 date of the parent application.

13 A claim of priority means that the
14 continuation application is claiming entitlement to the
15 same filing date as the parent application such that the
16 continuation is treated as if it were filed on the same
17 date as the parent application.

18 The date that the parent application was
19 filed is the effective filing date, even though the
20 application may have been filed months or years later.

21 The effective filing date determines
22 whether certain items constitute prior art that can be
23 used to invalidate a patent. Here, the patent
24 application filed as a continuation of the '780
25 patent -- no. Excuse me. That sentence should be --

1 MR. ADAMO: I think it's okay if you read
2 it the way you wrote it, Your Honor.

3 THE COURT: All right. Here, the '639
4 patent application was filed as a continuation of the
5 '780 patent and claims priority to the '780 patent.

6 I will now explain to you Newegg's
7 grounds for invalidity in detail. In making your
8 determination as to invalidity, you should consider each
9 claim separately.

10 All right. The first is anticipation for
11 lack of novelty.

12 A patent claim is invalid if the claimed
13 invention is not new. For a claimed invention to be
14 invalid on the basis of anticipation because it is not
15 new, all of its elements must be in a single previous
16 device or method or described in a single previous
17 publication or patent.

18 These items are called prior art
19 references. You may not combine two or more items of
20 prior art to prove anticipation.

21 Newegg must prove by clear and convincing
22 evidence that the various claims of the patents-in-suit
23 are anticipated by a single item of prior art.

24 The disclosure in a prior art reference
25 does not have to be the same words as the claim, but all

1 of the elements of the claim must be there, either
2 stated expressly or necessarily implied or inherent in
3 the level of ordinary skill in the field of technology
4 of the patent at the time of the invention so that
5 someone of ordinary skill in the field of technology of
6 the patent, looking at that one prior art reference,
7 would be able to make and use the claimed invention.

8 Something is inherent in an item of prior
9 art if it is always present in the prior art or always
10 results from the practice of the prior art and if a
11 skilled person would understand that to be the case.

12 Inherency may not be established by
13 probabilities or possibilities. The mere fact that a
14 certain thing may coincidentally result from a given set
15 of circumstances is not sufficient.

16 I will now explain the different ways in
17 which Newegg can show that the various claims of the
18 patents-in-suit are not new.

19 Anticipation by a printed publication or
20 prior patent.

21 A patent claim is invalid if the
22 invention defined by that claim was described in a
23 printed publication or patented in the United States or
24 a foreign country before it was invented by the patent
25 application or more than one year prior to the filing

1 date of the United States patent application -- the
2 effective filing date of the United States patent
3 application. Printed publications may include issued
4 patents.

5 A printed publication or patent will not
6 be an anticipating prior art reference unless it
7 contains a description of the invention covered by the
8 patent claims that is sufficiently detailed to enable
9 one of ordinary skill in the field of the technology to
10 practice the invention without undue experimentation.

11 Factors to be considered in determining
12 whether a disclosure would require undue experimentation
13 include:

14 (1) the quantity of experimentation
15 necessary;

16 (2) the amount of direction or guidance
17 disclosed in the patent or publication;

18 (3) the presence or absence of working
19 examples in the patent or publication;

20 (4) the nature of the invention;

21 (5) the state of the prior art;

22 (6) the relative skill of those in the
23 field of the technology;

24 (7) the predictability of the art;

25 (8) And the breadth of the claims.

1 A printed publication must be reasonably
2 accessible to those members of the public who would be
3 interested in its contents.

4 It is not necessary that the printed
5 publication be available to every member of the public.
6 So long as the printed publication was available to the
7 public, the form in which the information was recorded
8 is unimportant.

9 The information must, however, have been
10 maintained in some permanent form, such as printed or
11 typewritten pages, magnetic tape, microfilm,
12 photographs, or photocopies.

13 A United States patent that was filed
14 before the inventors of the patents-in-suit invented one
15 of their claimed inventions is prior art with respect to
16 those claimed invention -- inventions as of the date the
17 United States patent was filed.

18 In other words, a U.S. patent can be
19 prior art, as of its filing date, if it was filed before
20 the inventors of the patents-in-suit invented their
21 inventions, even if the patent did not actually publish
22 or issue until after the inventors invented their
23 inventions.

24 Next is anticipation by public knowledge
25 or use by another.

1 A patent claim is invalid if the
2 invention recited in that claim was publicly known or
3 used in the United States by someone other than the
4 inventor before the patent applicant invented it or more
5 than one year before the effective filing date of the
6 United States patent application.

7 Private or secret knowledge, such as
8 knowledge confidentially disclosed within a small group,
9 is not enough to invalidate a patent claim. A prior
10 public use by another may anticipate a patent claim even
11 if the use was accidental or was not appreciated by the
12 other person.

13 Thus, a prior public use may anticipate
14 an invention even if the user did not intend to use the
15 invention or even realize he or she had done so.

16 Next is anticipation by a prior
17 invention.

18 A patent claim is invalid if the
19 invention defined by that claim was invented by another
20 person in the United States before it was invented by
21 the patentee and that other person did not abandon,
22 suppress, or conceal the invention.

23 As a general rule, the first person to
24 reduce an invention to practice is said to be the first
25 inventor. An invention is reduced to practice either

1 when a patent application is filed or when the invention
2 is made and shown to work for its intended purpose.

3 Thus, if another person reduces to
4 practice an invention before the inventor on the patent,
5 then the reduction to practice by the other person will
6 be prior art to the patent claims.

7 A patentee who is not the first to reduce
8 to practice can still be the first to invent if he can
9 show two things:

10 (1) that he conceived of the invention
11 before the other party conceived of his invention;

12 And (2) that he exercised reasonable
13 diligence in reducing his invention to practice from the
14 time just before the other party conceived to the time
15 he reduced it to practice.

16 Conception is the middle part of an
17 inventive act, i.e., the formation in the mind of the
18 inventor of a definite and permanent idea of the
19 complete and operative invention as it is to be applied
20 in practice.

21 Reasonable diligence means that the
22 inventor worked continuously in the United States on
23 reducing the invention to practice. Interruptions
24 necessitated by the everyday problems and obligations of
25 the inventor or those working with him or her do not

1 prevent a finding of diligence.

2 Next is corroboration of oral testimony.

3 Oral testimony alone is insufficient to
4 prove prior invention or that something is prior art.

5 A party seeking to prove prior invention
6 or prior art also must provide evidence that
7 corroborates any oral testimony, especially where the
8 oral testimony comes from an interested witness or a
9 witness testifying on behalf of an interested party.

10 This includes an individual or company
11 testifying that his invention or its invention predates
12 the patents-in-suit.

13 Documentary or physical evidence that is
14 made contemporaneously with the inventive process by
15 someone other than the alleged inventor, provides the
16 most reliable proof that the alleged prior art
17 inventor's testimony has been corroborated.

18 For any oral testimony that a party has
19 put forth alleging that a particular event or reference
20 occurred before the filing date of the patents-in-suit,
21 that party must also have provided some sort of
22 corroborating evidence that agrees with the oral
23 testimony.

24 If you find the party has not
25 corroborated the oral testimony with other evidence, you

1 are not permitted to find that the subject of that oral
2 testimony qualifies as prior art or supports a prior
3 date of invention.

4 If evidence is presented for purposes of
5 attempting to corroborate oral testimony, then you must
6 determine whether this evidence does, in fact, properly
7 corroborate that oral testimony.

8 In making this determination, you should
9 consider -- consider the following factors:

- 10 (1) the relationship between the
11 corroborating witness and the alleged prior user;
- 12 (2) the time period between the event and
13 this trial;
- 14 (3) the interest of the corroborating
15 witness and the subject matter of this suit;
- 16 (4) contradiction or impeachment of the
17 witness's testimony;
- 18 (5) extent and detail of the
19 corroborating witness's testimony;
- 20 (6) the witness's familiarity with the
21 subject matter of patented invention and the alleged
22 prior use;
- 23 (7) probability that a prior use could
24 occur considering the state of the art at the time;
- 25 And (8) impact of the invention on the

1 industry and the commercial value of its practice.

2 All right. That completes all of the
3 instructions relating to Question No. 3 in your verdict
4 form, which is the invalidity defense.

5 The next question that you will answer is
6 the damage issue. If you have found in Questions 1 and
7 2 that any claims of the patent are infringed, then
8 you'll answer this Question No. 4. And here are your
9 instructions with regard to answering the damage issue.

10 I have now instructed you as to the law
11 governing Soverain's claims of patent infringement and
12 Newegg's claims of invalidity.

13 If you find that Newegg has infringed a
14 claim of the '314, '492, or '639 patents, then you must
15 determine what damages Newegg must pay Soverain for that
16 infringement.

17 If, on the other hand, you find that
18 Newegg has not infringed a claim of the '314, '492, or
19 '639, then Soverain is not entitled to any damages, and
20 you should not make any findings about damages for that
21 claim.

22 The fact that I am instructing you about
23 damages does not mean that Soverain is or is not
24 entitled to recover damages.

25 You should not interpret the fact that I

1 have given instructions about damages as an indication
2 in any way that I believe Soverain should or should not
3 win this case.

4 I am instructing you on damages only so
5 that you will have guidance in the event you decide that
6 Newegg is liable and that Soverain is entitled to
7 recover money from Newegg.

8 Now, the date the damages begin.

9 In considering damages, the time period
10 is November 2, 2007, to present. It is undisputed that
11 Soverain cannot recover damages for any infringement of
12 the patents-in-suit before November 2, 2007.

13 Reasonable royalty.

14 The patent laws specifically provide the
15 amount of damages that Newegg must pay Soverain for
16 infringing Soverain's patents may not be less than a
17 reasonable royalty for the use that Newegg made of
18 Soverain's inventions.

19 A royalty is a payment made to the owner
20 of a patent by a non-owner in exchange for rights to use
21 the claimed invention. The royalty payment generally
22 reflects the value of the use of the claimed invention.

23 A reasonable royalty is the royalty that
24 would have resulted from a hypothetical arm's-length
25 negotiation between Soverain's predecessor, Open Market,

1 and a company in the position of Newegg on the eve of
2 the infringement with both sides at this negotiation
3 willing to enter into a license and both sides at this
4 negotiation operating under the assumptions that the
5 patents are valid, the patents are infringed, and the
6 licensee should respect the patents.

7 You are to decide what a reasonable
8 royalty would be, based on circumstances as of the time
9 just before Newegg began selling or using the patented
10 inventions.

11 You may consider any actual profits made
12 by Newegg and any commercial success of the patented
13 inventions, but the amount of those profits is not
14 determinative on the issue of what a reasonable royalty
15 is.

16 Although the relevant date for the
17 hypothetical reasonable royalty negotiation is the date
18 that infringement began, you may consider in your
19 determination of reasonable royalty damages any evidence
20 with respect to the expectations for the future that the
21 negotiators had as of the eve of infringement and any
22 actual profits by Newegg after that time and any
23 commercial success of the patented invention in the form
24 of sales of the patents or infringing product after that
25 time.

1 You may only consider this information,
2 however, if it was foreseeable at the time the
3 infringement began.

4 Soverain has the burden to prove by a
5 preponderance of the evidence that it suffered the
6 damages it seeks. While Soverain is not required to
7 prove damages with mathematical precision, it must prove
8 its damages within reasonable certainty.

9 Soverain is not entitled to damages that
10 are speculative, and Soverain's proof of damages must
11 have a sound economic basis.

12 Now, reasonable royalty.

13 In deciding what a reasonable royalty is,
14 you may consider the factors that Soverain would
15 consider in setting the amount Newegg should pay.

16 I will list for you a number of factors
17 you may consider. This is not every possible factor,
18 but it will give you an idea of the kinds of things to
19 consider in setting a reasonable royalty.

20 And here, you're -- on the next -- this
21 page and all the next pages, you see 15 factors, which
22 are -- have been -- you've heard referred to in the
23 testimony as Georgia-Pacific Factors.

24 These are the factors you would consider
25 in setting a reasonable royalty. I commend them to you

1 for your reading. I'm not going to read them all to
2 you. The attorneys will point out the ones that they
3 think are most important for you to consider or not
4 consider, in their closing arguments.

5 Now, over to the top of Page 20: In
6 addition, it is proper for you to consider any economic
7 or business factors that normally prudent business
8 people would, under similar circumstances, reasonably
9 take into consideration in negotiating the hypothetical
10 license.

11 Next is non-infringing alternatives.

12 In determining a reasonable royalty, you
13 may consider whether or not Newegg had commercially
14 acceptable, non-infringing alternatives to making a
15 license -- to taking a license from Open Market that
16 were available at the time of the hypothetical
17 negotiation and whether that would have affected the
18 reasonably royalty the parties would have agreed upon.

19 All right. That concludes my
20 instructions relating to the damage question that you
21 will answer.

22 Now let me just give you some general
23 instructions regarding your deliberations and how to
24 conduct them.

25 You must perform your duties as jurors

1 without bias or prejudice as to any party. The law does
2 not permit you to be controlled by sympathy, prejudice,
3 or public opinion.

4 All parties expect that you will
5 carefully and impartially consider all of the evidence,
6 follow the law, as it is being given to you, and reach a
7 just verdict regardless of the consequences.

8 It is your sworn duty as jurors to
9 discuss the case with one another in an effort to reach
10 agreement, if you can do so. Each of you must decide
11 the case for yourself, but only after full consideration
12 of the evidence with the other members of the jury.

13 While you are discussing the case, do not
14 hesitate to re-examine your own opinion and change your
15 mind if you become convinced that you are wrong.

16 However, do not give up your honest
17 beliefs solely because the others think differently or
18 merely to finish the case.

19 Remember that in a very real way, you are
20 the judges, judges of the facts. Your only interest is
21 to seek the truth from the evidence in the case.

22 You should consider and decide this case
23 as a dispute between persons of equal standing in the
24 community, of equal worth and holding the same or
25 similar stations in life.

1 When you retire to the jury room to
2 deliberate on your verdict, you may take this charge
3 with you, as well as exhibits which the Court has
4 admitted into evidence.

5 You should then select your foreperson
6 and begin conducting your deliberations. If you should
7 recess during your deliberations, follow all of the
8 instructions that the Court has given you regarding your
9 conduct during the trial.

10 After you have reached your verdict, your
11 foreperson is to fill in on the form -- on the verdict
12 form your answers to the questions.

13 Do not reveal your answers until such
14 time as you are discharged, unless otherwise directed by
15 me. You must never disclose to anyone, not even to me,
16 your numerical division on any question.

17 Any notes that you have taken during this
18 trial are only aids to your memory. If your memory
19 should differ from your notes, then you should rely on
20 your memory and not on your notes.

21 The notes are not evidence. A juror who
22 has taken notes should rely on his or her independent
23 recollection of the evidence and should not be unduly
24 influenced by the notes of other jurors. Notes are not
25 entitled to any greater weight than the recollection or

1 impression of each juror about the testimony.

2 Now, if you need to or want to
3 communicate with me at anytime, please give a written
4 message or question to the bailiff, who will bring it to
5 me. There will be forms provided for you to do so.

6 I will then respond as promptly as
7 possible either in writing or by having you brought into
8 the courtroom so that I can address you orally. I will
9 always first disclose to the attorneys your question and
10 my response before I answer your question.

11 After you have reached a verdict, you are
12 not required to talk with anyone about the case unless
13 the Court orders otherwise.

14 Now, that concludes my general
15 instructions.

16 I will say to you, we're going to take a
17 short break, about 15 minutes, and allow you to use the
18 facilities.

19 Then when we come back, you'll hear the
20 closing arguments, which will take about two hours, so
21 we're going to be, again, going till probably 12:30,
22 12:35. So I want you to have a good break and be rested
23 up before you hear the closing arguments.

24 Also, during your deliberations, as I
25 told you yesterday, beginning today, when you retire to

1 deliberate, you're going to be in charge.

2 So if you want to take a break, if
3 somebody wants to go outside and smoke or get some fresh
4 air or if you want to adjourn for the night and come
5 back tomorrow or you want to adjourn for dinner or you
6 need snacks or you need dinner, you just send a note out
7 and let me know.

8 But before you do any of those things, be
9 sure you communicate with me first, and I'll send you a
10 note saying it's fine to take a 20-minute break outside,
11 or it's fine to retire and come back tomorrow, whatever
12 you may decide that you want to do.

13 But you'll be in charge of your
14 deliberations. You can work as long or as hard as is
15 necessary to reach a verdict, and you will be in charge
16 at that time.

17 But right now we're going to take our --
18 let's go ahead and take a 20-minute break, till 20
19 minutes until 11:00, at which time we'll come back and
20 hear the closing arguments.

21 Please remember my instructions. Again,
22 still don't discuss this case. Even though you've heard
23 the charge, you've got to wait until you've heard all of
24 the closing arguments, and then -- about 12:35, 12:40,
25 then you'll be able to begin your deliberations.

1 So we'll be in recess until 10:40.

2 COURT SECURITY OFFICER: All rise.

3 (Jury out.)

4 (Recess.)

5 (Jury in.)

6 THE COURT: Please be seated.

7 All right. The Court will recognize

8 Mr. Adamo for purposes of closing arguments.

9 Would you like any time warnings,

10 Mr. Adamo?

11 MR. ADAMO: Absolutely, Your Honor. If I

12 could have a 30-minute warning and a 35-minute warning.

13 I'm going to try to be sat down before 40 minutes of my

14 hour.

15 THE COURT: All right. Very well.

16 MR. ADAMO: At least my first ups.

17 THE COURT: Okay.

18 MR. ADAMO: Ms. Ferguson, could we have

19 the -- thank you very much.

20 Well, good morning. We're at the end, or

21 close. Thank you for your attention so far. I just

22 need you to try to give me one more hour of your time.

23 As I said to you on Monday, if someone

24 uses somebody else's property without permission, they

25 should pay for it.

1 And as I also said to you on Monday when
2 this case started, Soverain needs your help to
3 accomplish this, to get Newegg to honor its
4 responsibilities, to do what the law requires.

5 We tried to do what we promised. We
6 tried, over the last four days, to bring to you the
7 evidence to show you that Sovereign deserves the help
8 we're asking from you now through your verdict, that
9 help to require Newegg to pay a reasonable royalty
10 damages provided by the law for over 56 million
11 transactions during the damages period, 56 million
12 transactions worth of infringement without which Newegg
13 would not be grossing well over \$2 billion per year from
14 its customers.

15 Remember -- and this is sort of a key
16 thing -- Newegg is nothing but its online shopping
17 website. It has no stores. It isn't planning to build
18 any stores. If the system doesn't exist and doesn't
19 operate, Newegg makes zero money. And that's always the
20 way it's been since the company was founded in 2001.

21 This system that this case is about is
22 essential, critical and essential to their business. No
23 computer system, no website, no Newegg. Keep that in
24 mind, please.

25 Now, traditionally, closing argument, as

1 you heard from Your Honor, you're supposed to review the
2 evidence, try to tie it all together, match it up
3 against the issues and the burdens of proof so that we
4 can demonstrate to you that the seven claims in the
5 three patents are infringed and that we should be
6 awarded damages.

7 For my first ups, that's what I'm going
8 to try to do. For once, Mr. Sayles gets book-ended by
9 me, not like the opening where he had the last word.

10 Today, I have the last word, because I
11 have to demonstrate entitlement to your verdict on
12 infringement and on damages.

13 The last 20 minutes, I may not be so
14 traditional. I'm going to try to do some things that
15 may be a little bit different, so let's go.

16 One of the things that His Honor charged
17 you just a few minutes ago was that you can make
18 deductions and reach conclusions that reason and common
19 sense lead you to draw from the facts.

20 At the end of the day, this is all about
21 your common sense, your everyday experience, what you
22 feel is correct and proper under the law after you've
23 seen the witnesses, you've seen the cross-examination,
24 and you've heard the evidence.

25 Now, I'm going to take just a few minutes

1 to review the invention story again, because that is
2 where we start. And that, I believe, is important to
3 keep in mind, because it's been portrayed as if these
4 people invented nothing and certainly nothing that was
5 worth anything.

6 You saw Win Treese testify. He testified
7 here live. In fact, he was also called as a witness by
8 Mr. Sayles.

9 You saw Dr. Stewart, co-inventor also,
10 testify by videotape.

11 So you saw both of the inventors testify,
12 and they talked about the circumstances of their making
13 the inventions of the seven claims of the three
14 patents-in-suit back in 1994/'95.

15 Remember the historic setting. Internet
16 available for commerce in 1991. Worldwide web developed
17 1991/'92. Great potential if you could put the two
18 together. The web gives you pictures, which the
19 internet couldn't do, mostly text. Tremendous potential
20 for business.

21 The problem was, the potential that was
22 there was difficult. There were technical problems,
23 serious technical problems.

24 The potential was, you could possibly
25 develop a website that was just like going to your local

1 store, browse, take things off the shelf, put them in
2 the shopping cart, take them out of the shopping cart,
3 put them back if you decided you had changed your mind.

4 The potential was there, but how to do
5 it? That's what they were intending to do. They wanted
6 to come up with a system that would allow you to browse
7 or mimic the real world.

8 Two problems, as you recall. And you've
9 heard this throughout the course of the testimony. The
10 problems were state and session.

11 The web was stateless deliberately. You
12 heard the testimony about how you need to maintain
13 session. You've got to be able to track what's in your
14 carts and be able to determine whether you're still in a
15 session or not. You have to be able to track whether
16 there have been multiple requests.

17 And in the book that you heard about that
18 Dr. Stewart and Mr. Treese wrote in 1998 -- this is
19 Plaintiff's Exhibit 82 -- they summarized the issues of
20 state and session that they had to solve. These were
21 the problems.

22 They also needed to handle the situation
23 about completing a transaction. You wanted to pay
24 online. You didn't want to have to go and e-mail
25 something in or fax something in. Just like we do

1 today, you wanted to be able to do it all in one fell
2 swoop.

3 You wanted to sit down, maybe with a soft
4 drink in your hand, bring the computer up, start
5 shopping, go from here to there, maybe go to another
6 website, give them your credit card number; and by the
7 time you sat up and went on to whatever else you were
8 going to do at home, the transaction was completed, and
9 you had bought stuff.

10 You recall the timeline to the various
11 events. A bunch of guys came out of DEC, joined the
12 company in May of 1994, April of 1994. Had the two
13 critical ideas in May of '94 and June of '94. And by
14 October of '94, they had the business up and running,
15 essentially, as you recall Mr. Treese's testimony, by
16 ridiculous workhours.

17 Everybody in this industry seems to work
18 very hard, 24/7, all-nighters, don't go home, sleeping
19 in the same clothes, too many McDonald's hamburgers,
20 et cetera. But because they were committed to getting
21 this developed, they got it done in the amount of time
22 that they spent, exceedingly short period of time.

23 Three patents-in-suit. Two of them, the
24 '314 and the '492, these were the patents that covered
25 essentially the soup to nuts, as I referred to it; the

1 entire shopping experience, using the worldwide web and
2 the internet; product descriptions go to the buyers all
3 the way through to the completion of the transaction.

4 And the '492 patent, if you recall, this
5 is the patent that allows -- by using the clicks, the
6 hypertext, allows the customer to get back a record of
7 your prior transactions.

8 And the '639 patent, the third
9 patent-in-suit, this was the patent that disclosed how
10 to solve the session identification problem. This is
11 the session ID patent.

12 So they got all three of these patents
13 filed. The '639 is a continuation, as you heard His
14 Honor say, of an earlier patent, all filed late 1994 or
15 early '95. The Patent Office examined these patents and
16 issued them for the first time starting in 1998.

17 Now, we're going to come back to this.
18 You've heard about the reexaminations. Two of the
19 patents-in-suit, '314 and '492, were reexamined.

20 In other words, the Patent Office, having
21 once decided they were patentable, were asked to do the
22 work again by amazon.com, not by us.

23 Actually, you now know that there's been
24 litigation between Soverain and amazon.com, and that was
25 part of amazon.com's litigation tactics, put it back in

1 the Patent Office.

2 And as you'll see, CompuServe Mall was
3 all over both of those procedures. The Patent Office
4 was fully informed of CompuServe Mall, and they
5 reexamined and allowed, continued, maintained the '314
6 and '492 despite the fact of the CompuServe Mall prior
7 art. That's the reexaminations that you've heard about.

8 All right. Burdens of proof. This is
9 important because it drives your considerations from
10 this point on. And His Honor made this fairly clear
11 this morning. I've only got preponderance of the
12 evidence burdens. I only have to prove more likely than
13 not, right?

14 Think of the scales of justice. All I've
15 got to do is get the scale to you-all to tip a little
16 bit, and that's preponderance of the evidence. That's
17 my level of proof to you for infringement and for
18 damages. That's all I have to prove.

19 The patent is presumed valid.
20 Mr. Sayles' burden and Newegg's burden is to show you
21 that there's evidence at the second level: Clear and
22 convincing evidence, the abiding belief that something
23 is true. That's the difference between the two.

24 So my burden of proof, preponderance of
25 the evidence.

1 Let's talk about Newegg for a moment.

2 Hang on just a second.

3 All right. As always, Ladies and
4 Gentlemen, the technology will kill you, given half a
5 chance.

6 All right. I'll just do this without
7 this.

8 Let's talk about Newegg for a moment.

9 If you recall, Newegg was founded in
10 2001. There was testimony regarding their S1, their
11 submission to the Securities and Exchange Commission.
12 You saw this blown up several times.

13 And the portion of the S1 form -- Page
14 12, Mr. Gooden. Take him just a moment -- this is where
15 Newegg told the SEC about how important the online
16 shopping system was to their business.

17 And I'll quote: A critical component of
18 our strategy is providing a high-quality customer
19 shopping experience. Accordingly, the effective
20 performance, reliability, and availability of our
21 website and network infrastructure are critical to our
22 reputation and our ability to attract and retain
23 customers.

24 Nothing in there about everything being
25 customer satisfaction. You recall there were some

1 surveys that you saw yesterday where the survey
2 choices -- Mr. Bakewell admitted the survey choices
3 didn't even allow a customer to talk about their
4 reaction to the website.

5 But to the Securities and Exchange
6 Commission, Newegg says: Our website and network
7 infrastructure are critical to our reputation and our
8 ability to attract and retain customers.

9 No website, no business.

10 You recall Mr. Wu testified that he had
11 looked at other people's websites at the time that he
12 was developing the Newegg website.

13 Interestingly, while he was looking at
14 those other people's websites -- and maybe he looked at
15 amazon.com's, maybe not; he doesn't really remember --
16 he never checked to see whether any of these people had
17 patents or not. At least that's what he says.

18 He never checked to see if he was
19 trespassing on anybody else's rights with the knowledge
20 that he gained; he just went ahead and benchmarked the
21 other websites and used them as an information source to
22 develop the Newegg system.

23 Now, Mr. Wu -- and you may not remember
24 this, because there's been an awful lot we've heard over
25 the last four days -- Mr. Wu was asked by Mr. Sayles on

1 redirect this question, quote: And why are you still
2 using that design even though you programmed it in 2000
3 with so little resources?

4 Mr. Wu answered: Well, Newegg is number
5 one performer in term of the responding time, because
6 our whole -- Newegg's architecture, the shopping cart,
7 Newegg is number one performers in the world. We are
8 happy with our performance, so we stick with our
9 solution.

10 Well, there's Mr. Wu pointing exactly to
11 one of the structures that we say the patents-in-suit
12 cover: The shopping cart. And he's attributing to that
13 presence in their system, importance such that they're
14 going to stick with the system, which is exactly what
15 they did.

16 All right. Now, infringement. First
17 thing I have to prove to you. Let me just review the
18 evidence for you.

19 You recall Dr. Grimes. Right after
20 opening statements, Dr. Grimes and I engaged in a
21 riveting -- which I'm sure y'all remember -- exciting
22 four-hour walk through approximately 120 slides with
23 pictures and citations and all the rest of that to try
24 to demonstrate to you folks the basis for his opinions
25 that there had been infringement.

1 And we went through essentially set by
2 set -- I'll get back to this.

3 We went through set by set -- and I'll
4 remind you what they look like in a moment -- of charts
5 where he had broken the claims down, and then we went
6 slide by slide to demonstrate the basis for his
7 allegations that there was infringement.

8 And we did that with the two claims of
9 the '314 patent; we did that for the three claims of the
10 '492 patent; and we did that for the two claims of the
11 '639 patent.

12 Now, in response, Newegg had Mr. Tittel
13 testify, and we'll talk about what Mr. Tittel had to say
14 in a moment.

15 The instructions in the charge that His
16 Honor just read that are relevant to you determining our
17 infringement case are the general infringement charge,
18 the direct infringement charge. That's where we're
19 saying Newegg itself directly infringes. Not its
20 customers, Newegg itself. And that's the remaining
21 portion of the charge.

22 And we have two ways that Dr. Grimes
23 demonstrated to you infringement: Literal infringement,
24 and then on one of the claim limitations, he talked
25 about the Doctrine of Equivalents.

1 Key point. Key point. Second one. Key
2 point. The claims of the '314 and the '492 patents are
3 system claims. And I think you'll remember there was a
4 lot of back and forth about that. System claims, okay?

5 We're only talking about completed
6 transactions here. That's all we're raising with
7 you-all as far as the damages.

8 So those transactions are only completed
9 transactions. That means nobody got up and walked away
10 from the computer before they finished the transaction
11 and bought something.

12 So all this talk you've heard about
13 somebody could have gone; they might not have stayed;
14 they might not have come in the first place, it's not
15 relevant.

16 All that counts here, because all we're
17 asking you to look at for damages, are completed
18 transactions. Somebody came to the computer, got on the
19 Newegg's system, stayed there until they bought
20 something, and then they left, okay?

21 '314 and '492 are system claims. And Dr.
22 Grimes tried to be very clear about that. All that
23 means is, you look for the system. Nobody has to use
24 it. Customer reaction is irrelevant.

25 You look at the system. The piece of

1 equipment programmed or having the capability -- that's
2 how His Honor charged you -- is what you're looking for
3 in each system.

4 Newegg uses the system at issue here to
5 sell. The customer uses the system to buy. The claims
6 relate to the Newegg side of that equation. They don't
7 require anything to be done by the customer. They were
8 very deliberately written that way, okay?

9 So I'm going to make it again, because
10 this is the second key point. Newegg uses the system to
11 sell; the customers use the system to buy; but the
12 claims are directed to what is on Newegg's side, not
13 anything the customer has to do.

14 If the computer was programmed to have a
15 certain functionality, which Dr. Grimes went through in
16 great detail, that's all that is necessary to
17 demonstrate infringement.

18 Who buys or sells the customer computer,
19 right -- right here -- and you-all have seen this until
20 you're probably sick of looking at it, but this is
21 Newegg's system chart.

22 There's the customer computer, which is
23 part of the system. Once that computer gets captured
24 when the customer comes on to the system, okay, it's now
25 part of the system. And it's designed that way.

1 Remember, Mr. Wu testified he knew
2 exactly what he was doing. The system was designed to
3 use the customer's computer as part of the system. Why?
4 He wanted to save money.

5 He knew there would be cookies. He knew
6 they'd be -- more likely than not, they would be turned
7 on, because that's their fallback position. If you
8 don't affirmatively turn them off, they're on. He knew
9 all of that.

10 So the system was designed to effectively
11 capture the customer computer. And that's why you see
12 the customer computer on the Newegg diagram of the
13 system. That's exactly what they were intended --
14 intending -- excuse me -- to do with the system.

15 So what do we know that's relevant to
16 this point, relevant to infringement?

17 A customer can't shop without being part
18 of the Newegg system. Remember, we heard testimony
19 about that. If the cookies aren't there or they're not
20 turned on, you get an error message. You can't complete
21 your sale. You can't complete your transaction. You
22 can't buy, okay?

23 So the customer has no choice. You've
24 got to become part of the system if you are, in fact,
25 going to buy something.

1 So in every one of the transactions we've
2 asked for damages on, the customer, necessarily, by
3 Newegg's design and control, became part of the system,
4 right?

5 Here -- that's the second point. The
6 customer can't shop without having the cookies enabled.
7 And the cookies are enabled by default. In normal
8 English, that means they're on automatically. You have
9 to do something deliberately to turn them off.

10 And you remember, when I cross-examined
11 Mr. Wu, he said: Oh, yeah, that's -- of course. That's
12 straightforward. Of course I knew that. I intended
13 that. That's how I designed the system.

14 So in a complete transaction, the
15 customer computer is part of the system. This is all
16 what Dr. Grimes testified to. The cookies are enabled,
17 and the system worked from start to finish exactly as it
18 was designed.

19 The customer acted as Newegg wanted them
20 to act. Newegg used the system itself, structured the
21 system directly, but the customers also did exactly what
22 the system was designed to do, because they have no
23 other choice.

24 That's what Dr. Grimes testified to.
25 There isn't any option. If they try to do it some other

1 way, it won't work. The system won't work.

2 And for all the transactions we've asked
3 you to award reasonable royalty damages on, the customer
4 stayed with the system, paid cash money, and that's
5 where Newegg's \$2 billion is coming from.

6 All right. Very briefly. I'm not going
7 to go through all of this again, believe me. This is
8 how Dr. Grimes presented the evidence to you. If you
9 all recall, he took the patent claim; he broke it down
10 with his own little numbering or lettering; he then went
11 through element by element with these types of slides.

12 And I think you may remember that. There
13 were about 90 of them. He went through element by
14 element with these slides. The slides show the relevant
15 drawings or documents. They've all got citations at the
16 bottom.

17 You remember I asked him about the source
18 information, so this is all evidence in the record, and
19 he gave you all the line-by-line information, and he was
20 meticulous about that.

21 He was driving me crazy it was taking so
22 long, because we had time budgets here, and he was over
23 the budget, but he was meticulous.

24 And you recall he kept score, more or
25 less, with these element-by-element charts with the

1 check sheets, and he went through element by element to
2 demonstrate infringement to you.

3 Now, this is just summarizing what I've
4 said to you a moment ago about Newegg using the entire
5 system itself. It has its own servers, databases, and
6 network links.

7 Once the customer comes on and the server
8 recognizes the customer, that computer is effectively
9 captured for the purposes of the transaction, as long as
10 they stay online.

11 And in every one of these transactions,
12 they stayed till the end. And from there on out, the
13 buyer computer becomes part of the system, runs on the
14 programming that Mr. Wu designed. That's how
15 Dr. Dris -- excuse me -- that's how we were able to
16 demonstrate to you that there was infringement.

17 Now, active inducement of infringement.
18 And there are -- and I'll show you this just in a
19 moment. He went through, remember, claim after claim
20 after claim after claim following exactly this system.

21 Now, active inducement. Here's the jury
22 charge on active inducement. This is actually an easy
23 act-of-inducement case in contrast to most. Here's the
24 reason why.

25 We're not asking for damages any earlier

1 than when we filed suit, okay? We sued for the reasons
2 Ms. Wolanyk described to you, and that's what starts the
3 damages period, okay?

4 So the various elements that you have to
5 show here, after you've been sued, are relatively
6 straightforward.

7 The person is aware of the patent. Well,
8 yeah, they got sued.

9 The person has an intent to cause the
10 encouraged acts. Well, yeah, they want people to come
11 to the website and buy stuff. They know that in the
12 lawsuit, we've said that infringes, okay?

13 So if you step through the
14 act-of-inducement requirements in the charge, you will
15 see that they're very readily demonstrated because we
16 had already sued them. They knew exactly -- and the
17 lawsuit was going on, so they were getting more and more
18 information every day about what we said they were doing
19 wrong and what infringed.

20 So there's no question about the fact
21 that they had the necessary intent here. This is
22 clearer than the usual -- the usual case because of the
23 lawsuit.

24 Now, Newegg's raised all sorts of excuses
25 and explanations as to why what they've done really

1 doesn't infringe. The principal excuse which you've
2 heard about till you're blue in the face is the cookie
3 story.

4 Is everything on the server side or the
5 cookie is on the client's side, and does that mean no
6 infringement? The answer very clearly is no.

7 And Dr. Grimes went and explained that to
8 you in great detail as to why it does not. He showed
9 you that the Newegg system both literally infringes; and
10 even under Newegg's argument about whether everything
11 had to be put into the shopping cart database every time
12 or could be put in all at once -- remember, there was a
13 whole bunch of discussion about that -- Dr. Grimes
14 demonstrated to you, accepting their position -- didn't
15 agree with them, but he accepted it -- that under the
16 Doctrine of Equivalents, you end up being able to
17 demonstrate infringement.

18 His Honor explained the Doctrine of
19 Equivalents to you in this charge.

20 Dr. Grimes and the web browsers, this is
21 where the cookies come from. Remember, Mr. Wu said:
22 Oh, yeah, I knew everybody was going to have a web
23 browser. I expected it. And I knew exactly how web
24 browsers were going to work. I counted on the cookies
25 being there.

1 You recall -- here's the explanation of
2 how the cookies work, how the information is stored and
3 passed back and forth until the end of the experience
4 whereon the information is transferred into the shopping
5 cart database.

6 You remember you were taken through this
7 diagram in some detail, again, pretty much line by line,
8 to demonstrate how the system worked.

9 Dr. Grimes took you through this. I
10 won't take the time to do this, because you've seen
11 animations, again, I'm sure, until you're blue in the
12 face. This is the animation that demonstrates how the
13 cookie goes back and forth.

14 How long does this run?

15 It's 35 seconds. Will you tolerate this
16 for 35 seconds?

17 All right. Run it one more time, and I
18 promise this is the last time I'll ever show it to you.

19 Here's how the ordering works. You
20 click. This is Newegg's website. Add-to-cart. Here's
21 the item across the internet, going to the shopping cart
22 computer. There's the cookie. And it doesn't go to the
23 shopping cart database, but it's on the cookie and comes
24 back and goes into the storage area, the little cookie
25 jar.

1 And then this is repeated for additional
2 product. Same procedure. To the cookie jar. The
3 second item. And this time, third time through, we're
4 going to check out. And here the cookie is picked up
5 with the information about the two items, and this time,
6 because it's going to checkout, it gets put into the
7 shopping cart database.

8 That, Dr. Grimes described to you in
9 great detail, is an equivalent. It passes the
10 function-way-result test. Way and function are
11 identical -- way and result are identical -- I'm
12 sorry -- function and result are identical, and the way
13 is not insubstantially different. That's the evidence
14 that you were provided.

15 And remember, you didn't hear any
16 response from Mr. Tittel on equivalency, not a word.

17 So Dr. Grimes was not challenged by
18 Mr. Tittel on this point. He did not testify, there's
19 nothing in the record in the way of an opinion from
20 Mr. Tittel challenging Dr. Grimes on the Doctrine of
21 Equivalents.

22 So you've got evidence here for literal
23 infringement and the Doctrine of Equivalents on the
24 particular element involved.

25 The various elements involved were 34(f),

1 and this is the evidence you were shown on that, 34(g),
2 and particularly 34(h). This was the element that the
3 equivalents proof was shown on.

4 Here is the literal analysis that he
5 showed you where he demonstrated that there was literal
6 infringement, and here is the Doctrine of Equivalents
7 analysis that you also were shown.

8 Function and result identical. The way,
9 the using of the cookies, insubstantially different from
10 leaving everything on the server side throughout.

11 And I won't rerun this one. You recall
12 we showed you this animation. This demonstrated how the
13 equivalent system worked, and I just won't take the time
14 to rerun this, although it looks like it's rerunning
15 itself.

16 Okay. Mr. Gooden saved us.

17 And similar system, all right? As he
18 went through and demonstrated to you, element by
19 element, he came back and he checked; and eventually, we
20 got all the way through to all of the elements on Claim
21 35, and that was his evidence of infringement on that
22 claim.

23 And then we just kept on slide after
24 slide, all the detailed evidence, full description,
25 Claims 35 and 51 of the '314; 17, 41, and 61, but only

1 on the new system on '492. Same type of presentation,
2 element by element, claim by claim.

3 So on the '639 patent for the two
4 different sessions, both Claim 60 and Claim 79.

5 And then he presented a summary to y'all
6 of his opinions, and this was the summary -- remember,
7 there are three websites involved. He testified that
8 newegg.com and Newegg dot Canada, CA, met all of the
9 elements of the asserted claims and that the
10 newegmall.com -- that's the new website -- met the
11 elements of the specific claims identified there.

12 This is the verdict form. This is my way
13 of saying to you that we suggest that as you consider
14 the evidence, we believe that the evidence would support
15 your coming to your own decision.

16 I'm not trying to tell you how to fill
17 this thing out. We suggest that the evidence would
18 support, under the preponderance of the evidence
19 standard, your reaching this view that both direct
20 infringement and inducement is shown with respect the
21 all of the claims in suit.

22 All right. Ms. Wolanyk, she's sitting
23 right there. Why did we have Ms. Wolanyk testify?
24 Here's the point.

25 I'm sure Mr. Sayles is going to get up

1 and show you the same slide he showed you in the
2 opening: Why are we here, the implication being that
3 the patent is not being infringed and not being valid
4 and us asking for a serious amount of money, there must
5 be something wrong with us being in this court; us,
6 being Soverain Software.

7 So we had Ms. Wolanyk testify, so you
8 could understand how the business reasons and the
9 business purposes explain why we're here.

10 We demonstrated through her testimony the
11 commitment of the company to the Transact product, the
12 nature of Soverain Software's businesses, the
13 appropriateness under the competitive situation, how the
14 industry is set up, and the well-accepted use of
15 licensing, for Soverain to be raising cash money by
16 licensing, needed revenue, and that then means, in
17 licensing programs, where you get people who are using
18 your technology and they don't license, you've got to
19 enforce the patents.

20 It's that simple. If you don't enforce
21 the patents, you don't have a licensing program when
22 people who should be paying refuse. It's just that
23 simple.

24 There is no fault or viable criticism
25 that I can see in a company seeking to put a case for

1 enforcement of its patent rights before a jury like you
2 folks in a United States District Court, such as we're
3 privileged to be in, in Tyler, Texas. Not one thing
4 wrong with doing that.

5 A company is entitled to exercise its
6 constitutional rights just like any of us are. That's
7 why we had Ms. Wolanyk testify.

8 Damages. Money. Is that why we're here?
9 Of course. I mean, I'm always glad to try a case; I'm
10 glad to particularly try a case in Tyler; but we're not
11 here just to have me practice trying cases.

12 Of course this is about money, and we're
13 asking for money under the law, and we believe we've
14 demonstrated to you that the client is entitled to
15 money.

16 THE COURT: Mr. Adamo, I failed to give
17 you your time notice. You've used 35 minutes.

18 MR. ADAMO: Thank you, Your Honor.

19 Newegg demonstrates second on the table
20 of all its competition as to where it stands on web
21 volume.

22 This is the reasonable royalty charge.
23 His Honor just read it to you, as to what we needed to
24 show, what we needed to demonstrate on reasonable
25 royalty. Mr. Nawrocki testified on that subject, which

1 I think you'll all remember.

2 These are the Georgia-Pacific Factors
3 that Mr. Nawrocki applied. His Honor has them in the
4 charge. You recall he mentioned that to you, but he
5 just skipped over them so you wouldn't have to sit
6 through them all.

7 Here's, in a nutshell, our damages
8 presentation. The damages period, November 2nd, 2007,
9 through today. A royalty payment that reflects the
10 value of the use of the claimed invention.

11 Now, you heard Mr. Wu, in the transcript
12 I just read you, specifically point to the shopping cart
13 as to why their system was so good and they got such
14 great response on it.

15 So that's the value that you've already
16 heard him testify that's appropriately considered here.
17 The value of the use of the claimed invention.

18 I hate to keep coming back over to this,
19 but this is so essential because of the way the
20 Defendants have brought the case. They don't use the
21 system; they don't have a business. There isn't
22 anything more valuable than that. Your business closes
23 down, of course it's valuable.

24 Here's the damages period in a bar graph.
25 There are the 28 million transactions.

1 A hypothetical negotiation, Open Market,
2 on critical and fundamental E-commerce patents, was
3 trying to monetize the patents.

4 You heard all this back and forth with
5 Mr. Bakewell yesterday and also with Mr. Nawrocki about
6 the buyout and whether \$70 million of stock that you
7 could sell on the stock market was cash or not.

8 I, quite frankly, didn't understand what
9 that was all about. Every time I've sold stock and I've
10 gotten cash for it, that is cash to me.

11 But Newegg, startup, limited financial
12 resources, but great expectations.

13 Technical factors for consideration under
14 Georgia-Pacific, Soverain.

15 Significance of the patents, they're
16 critical and necessary.

17 Newegg's view, they say relatively
18 unimportant.

19 Newegg technical alternative, that's
20 critical. None, zero, nada. No alternative, not at
21 that time. This was the system that they needed if they
22 were going to compete.

23 The licensing factors, all of which were
24 testified to by Mr. Nawrocki, the business factors, the
25 ranges of percentage of profitability, and et cetera,

1 how he apportioned the profit.

2 Do you remember these slides? Sorry.

3 They reproduced so badly that he got up here with a tear
4 sheet, and he showed you how he had made adjustments;
5 that he hadn't just followed the 25-percent rule
6 blindly. He demonstrated to you how he had made the
7 adjustments and went through quite a presentation on
8 that.

9 The bottom line, 28 million transactions,
10 80 cents per transaction.

11 Now, you remember, Mr. Bakewell yesterday
12 testified about the Odimo license where it was 85 cents
13 a transaction. So Mr. Nawrocki is not way off at 80
14 cents. But 80 cents for the two patents, 40 cents for
15 the '639 patent, \$34 million.

16 Yeah. That's real money. That's a lot
17 of money. And why is it so much? Because this is the
18 engine that their business runs on, and they're making a
19 lot of money and doing a lot of business; 28 million
20 transactions, totaled 12 million, I believe, last year
21 and a couple of billion dollars.

22 So the number value here is high, not
23 because we're trying to steal from people. It's because
24 of the use they've made of the licensed technology.

25 Same thing with this verdict form. All I

1 mean by this, as I filled it out, is here's what the
2 evidence that we've presented to you shows in the way of
3 the numbers. This is only my suggestion that under the
4 preponderance of the evidence, if this is your
5 conclusion, the evidence would support this conclusion.

6 Invalidity, I'm going to go through this
7 very briefly, very briefly.

8 This was Dr. -- mainly because you just
9 heard this yesterday afternoon, okay?

10 This is Dr. Shamos right there, the
11 billiard player, right? I -- frankly, I couldn't figure
12 out where Mr. Sayles was going. I was figuring in a
13 minute here we were going to have a money game going,
14 and we were going to either get Mr. Shamos to play for
15 our side or we were going to go down to some billiards
16 hall.

17 I am informed, because of my misspent
18 youth, I think billiards, I think, you know, pocket
19 billiards, like nine-ball and stuff like that. Well,
20 that's one of the things he does. But the real
21 billiards is the English thing with the red ball and the
22 white balls. That's -- that's really what he does.

23 But in any event, you heard Dr. Shamos.
24 He went through all of this evidence yesterday in
25 detail, where anticipation is their only ground for

1 alleging invalidity. Anticipation. That's it. That's
2 what you're going to have to decide when they present
3 this information to you.

4 One reference --

5 THE COURT: Mr. Adamo, you've used 40
6 minutes.

7 MR. ADAMO: Yes, Your Honor. I'll be
8 done in a shake.

9 One reference. Has to all be in one
10 reference. Can't combine references. Each element has
11 to be shown to be in one reference.

12 Clear and convincing evidence, okay?
13 Here's where the burden shifts over: Clear and
14 convincing evidence. And if you remember, with respect
15 to the '314 and '492, CompuServe Mall, that's what the
16 Patent Office was aware of during the reexaminations.

17 Clear and convincing evidence, evidence
18 that produces an abiding conviction that the truth of a
19 fact is highly probable.

20 And Dr. Shamos' conclusion was that
21 Mr. Tittel has not shown any asserted claim to be
22 anticipated. No single prior art reference discloses
23 all the limitations of any of the asserted claims.

24 There's a nice photograph of Dr. Shamos.

25 Mr. Tittel tried to advance this position

1 for Newegg, and if you recall, Dr. Shamos presented in a
2 great deal of detail why CompuServe Mall does not
3 anticipate.

4 It's an entirely different technical
5 structure: Through modem, dial-up, no worldwide web, no
6 internet.

7 All the messages in CompuServe come in on
8 one line. That's how the server knows who you are. Not
9 the way it works on the stateless worldwide web
10 internet.

11 And he took you through and showed you
12 how things went back and forth because the mainframe --
13 first, he showed Moby Dick; and then when you pushed O,
14 that was the only thing you could have ordered. And
15 there were no need for product identifiers. It was set
16 up that way.

17 The -- remember the different books?
18 These books. There was all this mixing and matching of
19 these books. That's what they supposedly showed. But
20 you can't mix and match. One reference. One book.

21 And Dr. Grimes -- I'm sorry -- Dr. Shamos
22 demonstrated to you why that book didn't satisfy the
23 evidentiary burden.

24 The differences between the internet and
25 CompuServe's server, he went through in great detail. I

1 won't go through all these. This is essentially the
2 presentation you saw yesterday. He went through claim
3 by claim, patent by patent, demonstrating that there
4 was, in fact, no evidence of anticipation. None
5 whatsoever.

6 Last point. His Honor mentioned
7 corroboration, that all of this testimony about -- all
8 of this information about prior art had to be
9 corroborated. There's no corroboration. Not under the
10 standard as His Honor charged him.

11 Mr. Trevor wasn't able to use the books
12 to do it, because as you recall, during Mr. Giannetti's
13 cross-examination, the books didn't have a disclosure.

14 They were written, basically, for someone
15 at a very, very, very high level, almost a high school
16 kid. HTML for Dummies, that's the type of people that
17 those books at the lowest level were written for.

18 So what do I suggest in the verdict form
19 with regard to invalidity? My suggestion is that under
20 clear and convincing evidence, the information in the
21 record from Dr. Shamos demonstrates that you would be
22 within, if you so conclude, the law and the burden of
23 proof if you reached this conclusion.

24 I thank you for your attention. I will
25 be back with you briefly after Mr. Sayles' comments.

1 THE COURT: Thank you.

2 MR. ADAMO: Your Honor, that completes my
3 first part of my closing.

4 THE COURT: Thank you.

5 MR. ADAMO: Thank you, sir.

6 THE COURT: You have 15 minutes left.

7 MR. ADAMO: Yes, sir.

8 MR. SAYLES: May it please the Court.

9 May I take just a moment to set up?

10 THE COURT: Yes, you may.

11 Okay. Y'all feel free to stand up and
12 stretch, if you want to.

13 JUROR: They were all telling me to sit
14 down. They were all afraid I would get in trouble.

15 THE COURT: It's not a bad idea.

16 (Pause in proceedings.)

17 MR. SAYLES: Your Honor, if you would,
18 I'd like a warning at 30 minutes, 15 minutes, and 2
19 minutes left.

20 THE COURT: 30, 15, and what?

21 MR. SAYLES: Two.

22 THE COURT: All right.

23 MR. SAYLES: May it please the Court.

24 Counsel, Ladies and Gentlemen.

25 I have to first start off by thanking

1 you. You've sat here for a week. It seems like much
2 longer time than that, I'm sure. It seemed longer than
3 that to me as well.

4 But I want to tell you that even though
5 you sat there, and you got sandwiches, and you get low
6 pay, and you see these highly-educated, high-priced
7 expert witnesses, it can be frustrating.

8 But I want to tell you how I feel about
9 your participation. The Constitution of the United
10 States, in the Seventh Amendment, gives us the right to
11 a jury trial, even in complicated matters like this.

12 I have, for 36 years, had the opportunity
13 to bring cases to juries just like you. And today I
14 stand up for Newegg. I stand up for a company that is
15 willing to stand up for itself and to challenge claims
16 that are made against it in a courtroom before regular
17 citizens like you.

18 And the reason I'm honored to do that, I
19 know from my experience that you and every jury I've
20 ever seen, takes that obligation very seriously. And it
21 takes a lot of courage by Newegg to stand up for itself
22 and take this case the distance to a jury verdict. And
23 they're willing to do it, and I'm proud to stand up for
24 them in doing it, and I thank you for your service.

25 I want to mention a few items that

1 Mr. Adamo touched on, and then I want to talk to you
2 about the issues in the case.

3 But, first of all, he asked you for your
4 help. And I know that he probably didn't mean anything
5 improper by that, but what I ask you for is a just
6 verdict based on the evidence and grounded in the law
7 that the Court has given you. That's what I'm asking
8 for.

9 And Mr. Adamo mentioned the reexamination
10 of two of these patents in the Patent Office. Let me
11 say very clearly now, and he'll correct me if I am
12 wrong, the reexamination before the Patent Office has
13 nothing to do with the issue of infringement. Nothing.
14 That is for you to decide. Newegg was not involved in
15 that. The issue of their infringement was not involved.

16 The next thing I want to talk to you
17 about is the burden of proof. And it is true, it is
18 true that the burden of proof on Soverain in this case
19 is a preponderance of the evidence, but let's not
20 trivialize that. It is their burden of proof, and the
21 law requires it.

22 And the burden of proof requires that
23 they actually persuade you, persuade you that a claim is
24 more likely true than not true.

25 Let me see if I can get this to work. If

1 not, I'm just going to tell you what it says and go from
2 there.

3 Here's the burden of proof. Soverain has
4 the burden of proving infringement by a preponderance of
5 the evidence. Preponderance of the evidence means
6 evidence that persuades you that a claim is more likely
7 true than not true.

8 Now, let me tell you what this means in
9 the context of this case. Soverain has to meet that
10 burden of proof to get infringement. If they don't get
11 infringement, the case is over. If you answer no to
12 those first questions that you're asked about
13 infringement, then that's it.

14 And that's what you should do based on
15 the evidence in this case. More likely true than not
16 true.

17 What if, in your mind, you heard the
18 evidence back and forth and you heard the experts debate
19 and it's a tie or less than a tie? If that's the case,
20 they have not met their burden of proof, and the answer
21 to the questions on infringement is no.

22 So let's not allow them to trivialize the
23 burden of proof on the issue of infringement. It's
24 important.

25 You know, Mr. Adamo argued that the

1 website to Newegg is important to its business, and he
2 quoted the S1. Sure it is. Sure it is. But let me
3 reason with you for just a moment.

4 The front door to the grocery store is
5 important to the grocery store's business. The shopping
6 cart that you roll up and down the aisles is important
7 to the grocery store's business. And clearly, the
8 website in this case is important to Newegg's business.

9 But you heard Mr. Wu say that the accused
10 functionalities of these patents, if you assume that
11 there's some similarity here, represent .6 cents, 6/10
12 of 1 percent, of the entire code for that computer
13 program. That's the evidence. Less than 1 percent.

14 Now, it's not all measured by the amount
15 of code. The code is what it takes to make that whole
16 computer program run, and there's a lot more to it than
17 these inventions that are claimed here, a lot more to
18 it, 99 percent more to it in the case of Newegg, plus
19 all the other factors that you heard about Newegg's
20 success.

21 They have achieved success, and I ought
22 not to stand here and have to apologize for that.

23 Newegg came out in 2001 at the very time
24 that internet companies were having a hard time. They
25 came out at a time when many companies, including Open

1 Market and Soverain, were failing.

2 And now we know today they succeeded.

3 They ought not to be punished for that. They ought to
4 be proud of that.

5 We know Mr. Wu, when he did his work day
6 and night with very few resources, as you heard, that he
7 didn't go look and see if there were patents that
8 covered the work that he did.

9 Well, think about this for just a moment.
10 If you or I write a song or a poem, and in our heart, we
11 know that we did it, we don't have to go listen to every
12 song in the world or read every poem in the world to see
13 if our work is original.

14 So the fact that James Wu didn't go check
15 for patents is meaningless in this case.

16 With regard to Mr. Adamo's argument on
17 the source code, he argued that Mr. Grimes confirmed
18 that these functionalities were in the source code.

19 Actually, Mr. Grimes, if you listened
20 carefully, admitted he himself did not look at the
21 source code; that one of his colleagues did. That means
22 somebody that worked for him.

23 And I want to cover a few items in the
24 charge with you for just a moment, and then I'm going to
25 turn to the very issues in the case.

1 Remember, the law says -- and I know
2 you've heard this at least four times -- to cover what
3 the dependent claim covers, you have to look at the
4 claim it depends upon.

5 And in the verdict form, you will see
6 there are some dependent claims. And the verdict form
7 does not mention the independent claim, but you have to
8 look at that to determine if there's infringement in
9 those cases. And I'm going to show you in a moment why
10 the elements of the claims are not met.

11 And remember this, also: I mentioned to
12 you, and you heard it in the Court's Charge, in order to
13 infringe the claims of a patent, the accused
14 functionality must meet each and every element. Not 9
15 out of 10, not 9-1/2 out of 10, but 10 out of 10.

16 And I'm going to show you the elements
17 that are missing and why there's no infringement. And
18 Soverain has the burden of proving this.

19 I'm going to show you on Page 8 where
20 this -- I'm just going to quote from it.

21 On Page 8 of the charge, it says that if
22 the accused system or method does not contain one or
23 more of the limitations in reciting -- recited in the
24 claim, then the system or method does not directly
25 infringe that claim.

1 So, you know, what I just told you is
2 what the Court is saying in this charge. If one element
3 is missing, there's no infringement.

4 And there's another method of direct
5 infringement that was mentioned, and that is this issue
6 of the Doctrine of Equivalents.

7 The charge on Page 9 says: When no one
8 party performs all the steps of the claimed method but
9 multiple parties combine to perform every step of the
10 method, that claim will nevertheless be directly
11 infringed if one party exercises control or direction
12 over the entire method so that every step is
13 attributable to the controlling party.

14 Now, what that means is that in order to
15 infringe under the Doctrine of Equivalents here, Newegg
16 has to control and direct every step. We know that a
17 customer is involved here, and Newegg doesn't control
18 and direct every step that the customer takes.

19 And in fact, Mr. Grimes -- Mr. Tittel,
20 our expert, specifically explained that there were not
21 equivalents here.

22 He explained that abandoned -- that there
23 are abandoned shopping carts, and you can't shop from
24 multiple computers, for example. You know, if you go
25 from one to the other on the Newegg system, you can't

1 pick up where you left off, so to speak.

2 On the Soverain patent claims where they
3 have a server-side database, you can. It's an important
4 difference.

5 And also a point was made about cookies
6 not being enabled. Mr. Adamo said that the default is
7 that cookies are enabled.

8 Yes, for us individuals who may have a
9 computer at home, that's certainly true, but some people
10 turn them off. Some people work in companies and in
11 places where cookies are disabled.

12 So a person wanting to use the system has
13 to be sure that cookies are enabled. That person does
14 that, not Newegg.

15 Now, are the differences substantial or
16 insubstantial? They are very substantial, and I'll show
17 you in just a moment -- in fact, why don't we just do it
18 right now while we're here. You've heard this already.

19 Because the patents are invalid, Newegg
20 doesn't infringe, and Soverain's claim for damages is
21 grossly inflated. That -- that is what we're here
22 talking about. But here's the infringement issue that
23 I'm talking to you about now, why the answer is no to
24 these infringement questions.

25 Where is the shopping cart? In the

1 Soverain system, it's in a database on the Soverain
2 side. That's the way it's described in the '314 patent.

3 And Dr. Grimes said that he thought that
4 that was right, but he wasn't sure. But don't you know,
5 as smart as Dr. Grimes is and as much work as he did, he
6 does know that, too.

7 In the Newegg system, the shopping cart
8 is stored in a cookie.

9 When are the products added to a
10 database? On the Soverain patent, as soon as you hit
11 add-to-cart, they're added to a database.

12 The difference is that in the Newegg
13 system, it's only when you hit checkout and you have
14 collected all the products in the cookie, one time, on
15 checkout, they get dropped into the database to complete
16 the order.

17 And modification is one of the claims of
18 both the -- elements of the '314 and '492. It's a
19 common element. So if you find that this is
20 substantial, then there's no infringement for this
21 reason in both patents: What is modified in the
22 shopping cart database?

23 In the Soverain system, every time a
24 product is added, the database is changed on the server
25 side.

1 In the Newegg system, nothing happens as
2 products are added to the shopping cart cookie on the
3 Newegg side. Nothing. That is a substantial
4 difference, not an insubstantial difference.

5 And the differences, do they matter?
6 They absolutely matter. They're very important. It's a
7 waste of space on the Sovereign system, as described in
8 the patents, to have abandoned shopping carts, computer
9 space taken up by that; whereas on the Newegg system,
10 with the cookies, there's efficiency involved.

11 Sure, you lose some advantages, but
12 there's efficiency involved. This is not a meaningless
13 distinction. It's a very meaningful distinction.

14 Now, we talked about the cookie system,
15 and you've seen this and heard about this. Here's the
16 Newegg system where the order goes back and forth
17 between the client computer and the server. Never makes
18 it up to the database till checkout.

19 On the bottom here is the contrast to
20 what is described in the patents, which is a shopping
21 cart database on the server side. Client sends the
22 messages, and they go right into the server.

23 Here's a graphic depiction of the
24 substantial difference between the two systems. The
25 Newegg cookie-based shopping cart is just like a

1 shopping cart that can keep moving around and going up a
2 and down the aisle.

3 On the Soverain's patents, as they are
4 described in these -- in the '314 and the '492,
5 Soverain's server-side shopping cart results in every
6 single item being added on that side.

7 So Newegg does not add a plurality of
8 respective products to the shopping cart in the shopping
9 cart database. That's an element of the claims right
10 there. Respective products, plurality. That's got to
11 mean more than one.

12 Newegg does not modify the shopping cart
13 in the shopping cart database. You remember the
14 discussion about that? The shopping cart database on
15 the Newegg side is created one, and only one, time.
16 Everything goes into it. It's not added respectively
17 one by one.

18 Mr. Grimes' testimony here. Mr. Grimes
19 was asked -- and I wanted to tell you, this is not me
20 saying this; this is their expert witness, Dr. Grimes,
21 who's much more highly educated than I am and knows a
22 whole lot more about this than I do, so I'll take his
23 word for it.

24 To satisfy the system in this claim, the
25 user has to use -- put multiple items in the shopping

1 cart? That's the question.

2 And he said: That's -- that's the
3 evidence I put forward, yes.

4 Now, we'll get to the meaning of this in
5 damages in a few minutes, because there were a lot of
6 single-item transactions, but right now I'm talking
7 about infringement.

8 Here is the slide that was described for
9 a long time that describes that there's actually no
10 modification in the Newegg system. There's no
11 modification.

12 This is the last step. After the request
13 is made from the customer, it comes around, it gets a
14 number, the shopping cart cookie, with all the items
15 selected, goes over, and it all gets dropped into the
16 database on the Newegg side at one time, and then off to
17 the data center to ship the goods. A very substantial
18 difference.

19 Now, let me talk about the session ID
20 patent for just a moment here. That's the '639.
21 It's not infringed because Newegg doesn't forward a
22 request from the customer. There's no storing of a
23 session identifier. And you heard all about that in the
24 testimony. I know this is complicated stuff. And there
25 is no appending to a session identifier.

1 Each of these three things are elements
2 that you'll find in the claims of the '639 patent that
3 Newegg does not perform. And if it doesn't perform just
4 one of them, there's no infringement.

5 Now, the hypertext claims of the '492.
6 This -- the hypertext claims are like where you can
7 review your shopping order history. You know, you click
8 on a hypertext link, and it puts up your prior order.

9 And that's the idea behind the '492
10 patent.

11 And it has an element in there that
12 requires that Newegg do the programming of the buyer
13 computer, the customer's computer. That doesn't happen
14 here.

15 Html language, as was explained to you by
16 Dr. Tittel, is not a programming language, and that's
17 where hypertext links come from.

18 And actually, on the damages side,
19 there's really no evidence about how much customers use
20 this feature anyway. It's like a receipt or a review --
21 a review of your order that you can look back on
22 whenever you want to.

23 So there's no infringement of the
24 hypertext claims of the '492 for that reason.

25 Now, let me cover just a couple of more

1 instructions before I move to the issue of validity.

2 On active inducement of infringement, the
3 instruction on Page 10 of the charge says: A person is
4 liable for active inducement of a claim only if -- those
5 are the Court's words: Only if.

6 Let's take a look at this for a moment.
7 You see how good I am with technology. Anyway, let's
8 take a look at the active inducement instruction here.
9 I'm going to read it to you. It's on Page 10. And you
10 can see it, and I trust that you will.

11 A person is liable for active inducement
12 of a claim only if -- only if. Those are the Court's
13 words -- in Item 3, the person is aware of the patent
14 and knows or should have known that the encouraged acts
15 constitute infringement of that patent.

16 That's what it takes for inducement.
17 There are other elements, too, but that's the one that
18 shows you there is no inducement for this reason: Just
19 because Soverain files a lawsuit and claims that there
20 is infringement, doesn't mean that Newegg knows there is
21 infringement.

22 Doesn't a party have a right to contest
23 that? Doesn't -- doesn't the possibility of a
24 disagreement about whether there is or is not
25 infringement exist?

1 I mean, you've seen four days full of
2 evidence where you can see there's a disagreement, a
3 real one. No matter what you conclude, you have to see
4 that there's a disagreement here.

5 So how can a person know that their
6 actions that they encourage another to do would
7 constitute infringement of the patent in that situation?
8 This is an item of intent.

9 And if you -- when you turn to Page 11,
10 you'll see that on this inducement idea, the Court says:
11 You must find specifically that Newegg intended to cause
12 the acts that constitute direct infringement and must
13 have known or should have known that its actions would
14 cause the direct infringement.

15 If you do not find Newegg specifically
16 meets these intent requirements, then you must find that
17 Newegg has not actively induced the alleged
18 infringement.

19 Right there it is in black and white by
20 the Court. You have to know and intend to induce
21 infringement. It's mental intent.

22 Ladies and Gentlemen, that is probably
23 the second clearest thing in this case.

24 Now, let me touch on invalidity for a few
25 minutes.

1 And on invalidity, you'll see on Page 12
2 of the charge under anticipation, that the disclosure in
3 the prior art reference does not have to be in the same
4 words as the claim, but all of the elements of the claim
5 must be there, either stated expressly or necessarily
6 implied or inherent in the level of ordinary skill in
7 the field of technology of the patent at the time of the
8 invention so that someone of ordinary skill in the field
9 of technology of a patent, looking at the prior art
10 reference, would be able to make and use the claimed
11 invention.

12 So what do we have? We have two separate
13 items. And Mr. Baldauf went through this very carefully
14 with Mr. Tittel, Exhibit 2, CompuServe, Fourth Edition,
15 and he brought out the testimony that either -- not in
16 the same words -- and either expressly or necessarily
17 implied or inherent, all of the elements of these claims
18 are disclosed in this book separately.

19 And Exhibit 2 is not one of the many
20 references before the Patent & Trademark Office. Is
21 not. And you saw the pages from this book.

22 Separately, Exhibit 4, Using CompuServe.
23 Mr. Baldauf, in great painstaking detail, went through
24 the pages in this book showing that -- though not in the
25 same words, that the elements of the claims were

1 expressly stated or necessarily implied and understood
2 by one of skill in -- of ordinary skill in the art.
3 Separately.

4 Now, let me tell you one other important
5 thing about these books. Mr. Adamo has mentioned and in
6 his presentation mentioned that in the patents there is
7 a reference to a CompuServe book, and there is. Not
8 these two books but another book.

9 Now, don't you know, with a
10 highly-skilled and high-powered legal team that is
11 headed by Mr. Adamo, if that book was what they claim it
12 is, they would have brought it here, marked it as an
13 exhibit, and showed you what the pages are. They didn't
14 do that.

15 So you don't have any evidence of what's
16 specifically in that book about CompuServe, but you do
17 have what is in the two CompuServe manuals that we
18 developed through our expert witness that were not
19 before the Patent Office.

20 And don't you know, if their references
21 to CompuServe were so good, you would have seen them.
22 And you didn't.

23 I want to go now to a couple of slides
24 here.

25 All right. This is the Ellsworth book

1 that we developed in painstaking detail that I just
2 talked to you about. This is where that book says that
3 CompuServe Electronic Mall is the oldest shopping center
4 in cyberspace, and it goes on to describe more about its
5 features.

6 There was a mention in the examination of
7 one of our witnesses, and I'm sure it was Mr. Tittel,
8 that the word shopping cart is not in the book. Well,
9 there's actually something better than that. There's a
10 picture of a shopping cart right there, a picture of
11 one.

12 And there was an argument among the
13 experts about whether -- there it is in a little closer
14 form.

15 There was an argument about whether an
16 order stored in a personal holding file until you leave
17 the merchant's store is a shopping cart piece of
18 information.

19 Well, it obviously is. One skilled in
20 the art knows that. The words aren't there, but the
21 pictures are, and there's words there. So it's there.

22 Damages. I said the second most clear
23 thing in this case was that there was no active
24 inducement of infringement. The most obvious thing is
25 that the damages claimed here are not supported by the

1 evidence.

2 Now, on damages, the law says -- and this
3 is something that the Judge repeated that I worried
4 about from jury selection on.

5 THE COURT: You've used 30 minutes of
6 your time.

7

8 MR. SAYLES: Thank you, Your Honor.

9 The instruction on Page 17 says: The
10 fact I am instructing you about damages does not mean
11 Sovereign is or is not entitled to recover damages.

12 Right at the top of the page.

13 Now, as a lawyer, I'm obligated to talk
14 about damages just as the Court is required to instruct
15 you about damages. But as the Court says, that doesn't
16 mean there are any damages.

17 I submit to you that the evidence in this
18 case is, there is no infringement, and therefore, the
19 damages are zero. But to do my job, permit me to do
20 that without prejudice to Newegg, according to the law,
21 just the way Judge Davis did, and let me to talk about
22 that.

23 The instructions say that this would all
24 take place at a hypothetical negotiation in January of
25 2001. And believe you me, I realize that it's not gut

1 instinct as to why you would have a hypothetical
2 negotiation in January of 2001, but in the court case,
3 where the damage period is actually limited to 2007
4 until the time of trial.

5 Sounds kind of odd to me, but that's the
6 way the law works. You have to look back at the time of
7 the alleged first infringement and figure out, as best
8 you can, what the parties would likely have agreed to at
9 that time. That's what you have to do.

10 And back at the time of the negotiations,
11 sitting at the table for Open Market would have been
12 Shikhar Ghosh. And at the other end of the table would
13 have been James Wu or his boss, but certainly on the
14 Open Market side would have been Shikhar Ghosh.

15 Mr. Ghosh no longer has any interest in
16 this case. He -- there were a couple of witnesses here
17 who didn't have some sort of financial stake in the
18 outcome.

19 Ms. Wolanyk does. And I'm not being
20 critical of her. She owns a part of the company,
21 Soverain. Lee Cheng works for Newegg. James Wu works
22 for Newegg. But Shikhar Ghosh has moved on and has no
23 stake in this case.

24 And what he said was that at the time of
25 the hypothetical negotiation, that Open Market would

1 have been willing to license Transact to Newegg.

2 Now, the evidence in this case that's
3 actually in evidence that you have back in the jury room
4 is that the highest fee ever paid for a license for
5 Transact was \$344,000.

6 Now, don't you know, if a company is
7 sitting at the bargaining table negotiating for a patent
8 license, and one of the alternatives they have is to do
9 business with the guy sitting at the other end of the
10 table and to take a software license for that amount of
11 money, they're not going to give up one-third of their
12 profits for the life of these patents, which runs to
13 2014. There's no way reasonable business people would
14 have done that in January of 2001.

15 The damages instructions here say that --
16 on Page 17, down towards the bottom, that a reasonable
17 royalty is a result -- royalty that would have resulted
18 from a hypothetical arm's-length negotiation --
19 horsetrading, two-way street. Open Market didn't get to
20 dictate and hold out for as much as they wanted to. You
21 have to consider everything.

22 And you would have to consider a negotiation
23 between Open Market and a company in the position of
24 Newegg on the eve of infringement. I'm quoting the
25 Court. On the eve of infringement. Not Newegg in 2010,

1 but Newegg in 2001, when it was a startup company.

2 And on the eve of infringement, folks, that's
3 before -- right before the first transaction, the eve
4 of. You've got high hopes in 2001, but many others in
5 the internet commerce business failed time after time
6 after time.

7 So it would not be reasonable that the parties
8 would have foreseen or anticipated in the future that
9 this company would be as successful as it has been.

10 And so the charge says you decide what a
11 reasonable royalty would be based on the circumstances
12 at the time. It's on Page 17, just before Newegg began
13 selling and using the patented inventions.

14 And it surely does say that you consider the
15 profits made and any commercial success based on the
16 patented inventions. But the profits are not
17 determinative of what a reasonable royalty is. It says
18 it right there.

19 So they've been profitable today, but that
20 doesn't answer the question. It says in the charge, you
21 may only consider information if it was foreseeable at
22 the time the infringement began. That's a quote from
23 Judge Davis on Page 18.

24 The royalty factors. I am going to go through
25 a few of these. The first thing I want to do is give

1 you a couple of stipulations.

2 Could you go to 516, please, and Stipulation
3 25 through 30?

4 This is in evidence as Exhibit 516. A couple
5 of these are very pertinent to the damage issue that I'm
6 about to discuss.

7 And you don't -- let's see. Did we give y'all
8 the stipulations yet or -- I don't think so.

9 MS. JOHNSTON: I don't have it.

10 MR. SAYLES: You don't have it?

11 All right. I'm going to read these
12 stipulations to you.

13 No. 25. The patents-in-suit were
14 originally assigned from the inventors to Open Market.

15 We know that, but that's a stipulated
16 fact.

17 Open Market began selling a software
18 product named Transact in 1996.

19 27. The Transact product incorporates or
20 reflects each of the asserted claims of the
21 patents-in-suit, as well as additional functionality.

22 Transact had -- it was a product. It had
23 more in it than the patented technology, stipulated
24 fact.

25 Open Market's assets were purchased by

1 Divine in 2001.

2 And remember this number that was dropped
3 on you about that that was a 70-million-dollar
4 transaction? And Mr. Bakewell, who had studied it,
5 tried to explain, well, that was a stock-for-stock
6 transaction. It wasn't money. There was not money that
7 changed hands.

8 Stipulated Fact No. 29 is Divine declared
9 bankruptcy in 2003. Stipulated fact.

10 So stock of Divine became wallpaper just
11 like some of the owners of Open Market said that they
12 had stock and that it was just wallpaper now.

13 And Stipulated Fact No. 30 is Sovereign
14 has not licensed the Transact product to any licensees
15 that were not first licensed by Open Market.

16 Now, Transact has the patented
17 inventions. If they're so great, wouldn't you expect
18 that they would develop new customers and new clients?

19 But a stipulated fact is, they haven't
20 licensed that product to any licensees that weren't
21 first licensed by Open Market, and that takes us all the
22 way back to 2001.

23 Now, that bears on damages. How valuable
24 are these things?

25 These Georgia-Pacific Factors, I need to

1 talk about them. You'll see them when you look at the
2 charge.

3 Any royalties received by Soverain or its
4 predecessors from licensing the patents-in-suit.

5 Let me go through this first, since it's
6 in order.

7 Mr. Ghosh, who I said really doesn't have
8 a dog in the fight here: What caused Open Market to be
9 sold to Divine?

10 ANSWER: The business was in pretty bad
11 shape.

12 I think on cross-examination, there was
13 some quibbling with Mr. Bakewell, who said that. But
14 Mr. Bakewell, our damages expert, is merely quoting what
15 the chairman of the board said. And right there it is:
16 The company was in bad shape. Losing money hand over
17 fist.

18 Mr. Ghosh also said: If Newegg had
19 approached Open Market in 2001 wanting a license for
20 Transact, what would your reaction have been?

21 He said: We would have licensed it.

22 What better non-infringing alternative do
23 you have than a software product that has the patents in
24 it?

25 Mr. Ghosh also was asked: What terms

1 would you expect to be able to license Newegg for
2 Transact?

3 ANSWER: I have no idea, but standard
4 terms. I can't see why it would be different.

5 And he was asked: By standard, do you
6 mean terms similar to those of other merchants or
7 single-user agreements?

8 And he said: Yes.

9 QUESTION: Would you expect Newegg to pay
10 any fees based on revenues?

11 Mr. Ghosh, who would have probably been
12 the guy at the table doing the negotiating said:
13 Probably not.

14 QUESTION: Would you expect Newegg to pay
15 any fees based on the number of transactions that were
16 performed on their website?

17 How much better can you ask the question
18 to the most important person, the person sitting at the
19 other end of the bargaining table?

20 His answer: Probably not.

21 Mr. Paul Esdale, who testified very
22 briefly in this case by deposition, he said that Open
23 Market was a software company. That's what their
24 business was. That they even had discussions internally
25 about the appropriate use of the patents to encourage

1 sales.

2 And he said: We didn't do that.

3 So at the other end of the bargaining
4 table on the Open Market side, what do you have? You
5 have a company then that's really interested in
6 developing customers for Transact, not suing folks. Not
7 enforcing their patents at that time, but selling
8 Transact. That's what he said.

9 So as we went through, Mr. Nawrocki did
10 several things. His royalty base included unrelated
11 sales, he ignored the real-world licenses that are in
12 evidence, and he used the 25-percent rule.

13 And you know what? That's the rule of
14 thumb. That's the name of it. You know what the rule
15 of thumb is? I think that looks level. That's the rule
16 of thumb.

17 I asked him time after time: Did you do
18 an economic analysis of these various factors?

19 And he admitted it. He didn't. There's
20 no sound economic analysis here for that.

21 And the Court's Charge says that while
22 the Plaintiff doesn't have to prove their damages with
23 mathematical certainty, it says on Page 18, that they
24 are required to prove their damages with reasonable
25 certainty, with reasonable certainty.

1 The damages can't be speculative.
2 Soverain's proof of damages must have a sound economic
3 basis. That's the Court's Charge.

4 Now, the royalty factors. Go through a
5 couple of those.

6 Open Market, at the time of the
7 hypothetical negotiation -- you heard this very
8 distinctly in the evidence. I think we went over it
9 probably twice. It was on the way downward side. They
10 were below the zero line, in terms of their losses, at
11 the time of the hypothetical negotiation.

12 A party in that situation, don't you
13 know, would like to have a lump-sum payment at that
14 time. Only makes sense.

15 Their Transact product, their revenues
16 had peaked in 1999, and they were going downhill at a
17 rapid rate. And at 2001, their Transact revenues were
18 right there.

19 Don't you know, if they sat at a
20 negotiating table when Transact was going downhill, that
21 they would like to have a lump-sum payment for these
22 licenses? It only makes sense.

23 Open Market and Divine's patent licenses.
24 Now, these are the ones that are in evidence. And the
25 Court says you are to consider what is in evidence and

1 the reasonable inferences that you can draw from what's
2 in the evidence.

3 And there were 19 Open Market or Divine
4 patent licenses, and the range of these was 400 to
5 \$100,000.

6 Now, we got in a big debate about this
7 100,000-dollar license to Johnson & Johnson, which was
8 the largest one, but follow me on this for a moment.

9 These are the real-world licenses of the
10 patent up until the time of around 2002 or 2003 back
11 closer to the time of the hypothetical negotiation.
12 These are the ones that are in evidence.

13 And you're not supposed to speculate
14 about anything that is not in evidence. These are the
15 ones that are in evidence.

16 And if we take Johnson & Johnson, which
17 is the highest one at \$100,000, do you remember, on
18 cross-examination, Mr. Satine kind of argued that, well,
19 that the Johnson & Johnson license was different because
20 it only allowed internal use. He argued that.

21 Think about this. Well, all right. If
22 it's irrelevant and we took that off, what does that do
23 for them? It makes their picture worse, doesn't it?

24 If we took off the
25 hundred-thousand-dollar license, then you would have the

1 licenses in evidence that are a few thousand dollars;
2 the next highest one is \$30,000; over to Mr. Nawrocki's
3 calculation of nearly \$40 million.

4 And if you total all the licenses
5 together, including the Johnson & Johnson license, the
6 total of all of them was a lump-sum payment of \$200,000,
7 .6 percent of Mr. Nawrocki's damages.

8 All right. Let me agree with Mr. Satine
9 and let's take off the Johnson & Johnson hundred
10 thousand dollars, and that makes Mr. Nawrocki's number
11 .3, .3 percent of the total of all of the real-world
12 licenses entered into.

13 Doesn't help them. It goes the other way.

14 Transact. Yes, it's a software license, but
15 don't you know if -- and there's 10 in evidence. There
16 was testimony about didn't so-and-so testify that there
17 was one maybe for a million, but we can't come up with
18 it. There was testimony like that.

19 But the ones in evidence, the hard evidence,
20 the hard evidence that Mr. Bakewell relied on is the
21 ones that are in evidence, and the license fees there
22 range from a hundred thousand to 344,000.

23 THE COURT: Counsel, you have 12 minutes
24 left.

25 MR. SAYLES: Thank you, sir.

1 So Mr. Nawrocki's damage opinions are
2 totally inconsistent with the real-world evidence.

3 The Newegg source code -- now, this is --
4 I told you this related to damages as well. The Newegg
5 website has over 600,000 lines of source code, over
6 600,000 lines. That's where you write out how you make
7 the computer program work.

8 The shopping cart function, the hyper
9 state -- statement text statement (sic) and the session
10 ID functions are represented by these dots inside the
11 overall website.

12 That's how much these patented inventions
13 have to do with the overall website, about .66 percent
14 of the lines of code. Yet they want one-third of
15 Newegg's profits. It's not reasonable. It's not fair.
16 Newegg was successful for a lot of reasons. Sure, they
17 have a good website. Just like the grocery store has a
18 front door and shopping carts to push around, they have
19 a good website.

20 But there are all these other factors,
21 pricing, customer service, fast and accurate shipping,
22 product selection. And you see, I did include the
23 website on this graphic, but I did put in the dots that
24 represent graphically the source code for that.

25 That's why Newegg has been successful.

1 Wouldn't give up 25 percent to one-third of its profits
2 back when it was just getting off the ground. It's not
3 reasonable.

4 So there are a couple of Georgia-Pacific
5 Factors that I will mention, because I know that's a
6 funny word, too. But in every single patent case, we
7 talk about that, because that's the framework within
8 which to consider a reasonable royalty.

9 And these begin on Page 18 of the charge.
10 The first one is royalties received by Soverain or its
11 predecessors. Well, we know, we've been through the
12 fact that they were small.

13 The second factor, any rates paid by
14 Newegg for the use of other patents comparable to the
15 patents-in-suit.

16 Well, Newegg doesn't need to license
17 patents. It licenses software, as Mr. Cheng explained.
18 They have one patent license. It's not comparable to
19 these patents. It's the MPEG collection of patents that
20 it licenses and pays a payment of about \$4,000 twice a
21 year.

22 So the rates that Newegg has paid is
23 nothing really compared to what they're claiming here.

24 The third factor is whether the license
25 would be exclusive or nonexclusive.

1 Well, you pay more for an exclusive
2 license. It is clear that all the licenses in evidence
3 are non-exclusive to these patents, every single one of
4 them.

5 The fourth factor is whether the party
6 holding them wanted to preserve exclusivity, and they
7 didn't. There's no evidence that they did.

8 The fifth factor is, are the two parties
9 at the table competitors, or are they a customer and
10 potential client?

11 It says: Are they competitors? And you
12 know why? Because if you're competing in the same
13 field, you're going to charge more.

14 These two were not in the same field.
15 Open Market was a software company. Newegg was an
16 online retailer of electronics. And I think nearly
17 everybody admitted they weren't competitors.

18 The established profitability of the
19 commercial inventions and their commercial success,
20 well, we do know that Open Market was successful in
21 getting their press releases out to the public.
22 That's -- that's what we saw.

23 We saw those press releases they put out.
24 So what? They weren't profitable with these inventions
25 either by licensing or by putting them in the Transact

1 product.

2 13. I think 13 is unlucky 13 for
3 Soverain. This, I believe, is probably the most telling
4 factor. The portion of the profits that's due to the
5 patented inventions as compared to the portion of the
6 profits due to other factors, such as unpatented
7 elements or unpatented manufacturing processes or
8 features or improvements developed by Newegg.

9 First and foremost, Mr. Nawrocki did not
10 make an apportionment of the profits due to the
11 inventions. He didn't do it. And it's their burden of
12 proof on these damages. He didn't do it.

13 And you, finally, can consider economic
14 factors that business people, ordinary prudent business
15 people, would reasonably consider at that time.

16 There was a question brought up about the
17 Odimo license and the fact that it recites in it that
18 it's based on 85 -- 85 cents a transaction. It does,
19 but it's one year.

20 And I think I went through that in great
21 detail, that it's a paid-up license for the life of the
22 patents and based on a calculation done in year one.
23 Paid up forever.

24 That's the way most of these licenses
25 were that recite a percentage. In fact, I'll go out on

1 a limb and say all of them that recite a percentage.
2 Ms. Wolanyk herself acknowledged -- and let me say this
3 about Ms. Wolanyk. I have great admiration and respect
4 for her and what she has accomplished and her position,
5 but this case is not about that.

6 Let's take what she said. She -- she was
7 basically truthful in what she said. And I would ask
8 you not to decide this case on the basis of who you like
9 the best.

10 And, you know, the Plaintiff, by
11 tradition, gets to sit at the table where they are.
12 They get to sit there like they're in a receiving line
13 at a wedding and greet you each day. And that should
14 have nothing to do with anything really.

15 Ms. Wolanyk is a fine person, but she
16 said that most of the licenses were upfront, lump-sum,
17 paid-up. She never even mentioned, although she had
18 every opportunity, licenses for running royalties.

19 So I want to ask you, when you fill in
20 the verdict form, to answer no on infringement.
21 Question 1 and Question 2, both of those, answer no.
22 On validity, I ask that you answer yes to each one of
23 those blanks.

24 And then on the damages, the fourth
25 question, you're asked there to allocate your damages

1 between the '314 and the '492 and '639.

2 How in the world can you do that?

3 Mr. Nawrocki didn't really give you a basis for doing

4 that. You don't know from an economic standpoint.

5 There was no analysis of what each patent contributes to

6 the financial results here. There's no analysis of

7 that.

8 But however you do it, let's take

9 two-thirds and one-third. Let's take his 40 cents and

10 80 cents, totaling a buck twenty as our percentage. But

11 the damages, according to a sound economic analysis by

12 Mr. Bakewell, based on real-world evidence, not ignoring

13 it, is less than \$500,000.

14 So if you answer that question at all,

15 justice and fairness dictates that your answer be less

16 than \$500,000. That's the evidence.

17 I'm watching the clock, and I know I'm

18 about out of time, and there's so many things that I can

19 think of that I wish I could say. Time won't permit it.

20 But I'm comforted by this fact: There

21 are eight of you over there. I've added up your ages.

22 We have over 350 years of life's experience sitting

23 right over there in the jury box.

24 And I believe -- based on my experience

25 with trusting juries, I believe that among you, you

1 heard it all, and you can do a better job than I could
2 of standing up here and telling you all the additional
3 reasons that exist in this record for no infringement
4 and no damages or very low damages, below \$500,000.

5 So I have to trust that, and I do.
6 And I say once again, I'm proud of Newegg for taking a
7 stand and being willing to face a jury and accept the
8 result, because I believe that justice will be done.

9 And we don't ask you for help, and we
10 don't ask you for any favor. We ask that you ground
11 your decision in the law given to you by the Court and
12 as included in the evidence and as blessed by your
13 conscience, and that's all we can ask, and we await your
14 verdict.

15 THE COURT: Thank you, Mr. Sayles.

16 Mr. Adamo --

17 MR. ADAMO: Thank you, Your Honor.

18 THE COURT: -- rebuttal argument; 15
19 minutes.

20 MR. ADAMO: I have 15 minutes left, Your
21 Honor?

22 THE COURT: Yes.

23 MR. ADAMO: Would you give me -- would
24 Your Honor mind giving me a two-minute warning? We'll
25 make this like this is a football game.

1 THE COURT: Two minutes?

2 MR. ADAMO: Two minutes, please.

3 THE COURT: Okay.

4 MR. ADAMO: Thank you.

5 I'm not asking this jury to do me any
6 favors. This just goes to show you that -- I believe
7 it's Cardinal Richelieu who was once quoted -- at least
8 it was in a Three Musketeers movie that I remember
9 seeing, so that's where I learned it from -- give me six
10 lines, and I'll come up with a reason to hang the most
11 honorable of men.

12 By help, I meant to get Newegg to do what
13 it should have known to do without us having to file a
14 lawsuit. And in this court, you're the only ones who
15 can do that.

16 I have come before you showing you
17 evidence. I didn't even do what Mr. Sayles did and tell
18 you how to answer the verdict form, did I? I guess if I
19 wanted your help, I would have told you what to do. I
20 didn't do that. So let's get focused to what counts
21 here.

22 I told you I was going to be a little out
23 of the ordinary. I'm going to try to do this almost
24 like a two-minute drill.

25 Now, as I'm sure you all know, I am from

1 Dallas, but plainly, I'm not from here, okay? I've been
2 in Dallas since 1988. I do talk quickly. I'm going to
3 watch you to try to make sure that you're with me, but
4 I'm going to try to cover a lot of ground in a very
5 short period of time.

6 Let's start with the comments about
7 active inducement of infringement.

8 All right. Mr. Sayles seems to have read
9 over the part of the jury charge that says known or
10 should have known. You heard an awful lot about known,
11 but you didn't hear anything about or should have known.

12 And if you look at No. 3, you'll find
13 it's in there.

14 These folks have been in this lawsuit
15 since November of 2007. And as this lawsuit went on,
16 they were given more and more information from us about
17 why we felt that they infringed and why their conduct
18 was improper.

19 So the more they stayed in the lawsuit,
20 the more they learned. And the should have known came
21 into effect more and more every day.

22 Advertising, you recall I spent some time
23 with Mr. Cheng about inducement in the advertising.
24 Remember the websites and how they had bought the
25 advertising, and it led to such huge advantages for them

1 sales-wise. That's evidence, as you look at the Judge's
2 charge, to indicate that there's inducement.

3 We're tired. You're tired. But,
4 plainly, Mr. Sayles and I are tired, because Mr. Sayles
5 normally would not have missed such an obvious thing as
6 that. But he's missed some other things in some of the
7 discussions he's had with you.

8 I didn't say anything about source code.
9 He says that I did. I can guarantee you, I'm not that
10 sleepy that I don't remember what I'm talking about
11 here.

12 He says there's no evidence about what
13 our CompuServe articles to the Patent Office disclosed.
14 You remember that?

15 You remember me running around like a
16 chicken with my head cut off yesterday afternoon at the
17 end of the day, while Mr. Giannetti was taking redirect
18 examination from Dr. Shamos?

19 I put up on the screen, and Dr. Shamos
20 testified about one of the CompuServe articles that was
21 in the Patent Office. So there's the evidence.

22 And Dr. Shamos testified, it's even
23 better than these third-hand books. It was a CompuServe
24 internal document that described the system. Yesterday
25 afternoon. So I'm not quite sure how that got lost in

1 memory here.

2 That little -- I think VENN diagram is
3 what it was called, if I'm remembering this correctly.
4 I've never been much of a mathematics; but the big
5 thing, and Mr. Sayles was very proud of putting the
6 little dots in there, we keep hearing about 66 percent
7 of the code and the functionality.

8 I forgot where Wal-Mart was, a 24-hour
9 one, this morning; or I would be holding up a spark plug
10 right now.

11 How much of an engine is a spark plug,
12 all right? A spark plug is an exceedingly small part,
13 but that's what makes your car run. Take the spark
14 plugs out of the car, and you won't go two blocks.

15 Take the shopping cart and the session
16 identifier out of Newegg's system, and they won't sell a
17 nickel of anything.

18 So a small amount of code doesn't tell
19 you anything about the functionality. But you heard
20 Mr. Wu say -- and I quoted it, and I won't quote it
21 again, but you heard Mr. Wu say: We stick with the
22 system. We've got tremendous performance because of the
23 shopping cart.

24 You take the shopping cart and the 60.66
25 (sic) percent of code out of this thing, and the system

1 will look at you dumb. How much more important can you
2 possibly think of something being?

3 Doctrine of Equivalents. Counsel got up
4 here and told you about what was or wasn't a substantial
5 difference. Well, I guess if I was in his shoes, I'd
6 try to do the same thing. There's just one problem.
7 What he says isn't evidence. He's not an expert.
8 And he would be the first one, I would hope, with candor
9 to admit it. The Judge instructed you, what he or I say
10 is not evidence.

11 And Mr. Tittel, who's the person it
12 should have come from as to whether this was, in fact,
13 substantial or insubstantial -- Dr. Grimes testified it
14 was insubstantial. Mr. Tittel was silent. He didn't
15 offer an opinion.

16 So there's no countervailing evidence.
17 And Mr. Sayles' argument isn't evidence, according to
18 the Judge's instructions. And I know you-all are going
19 to follow the instruction.

20 I was waiting to see if that little round
21 and round chart that they're so proud of was going to
22 come back up. I'll show you why in a second.

23 Skip the first one. Start at 135.
24 Let me just show you what has been in front of the
25 patent -- no, not that one. We'll come back. That's

1 the end. I changed the order. Go to the next one. Go
2 to the one -- well, I'm going to tell you the story
3 about the goats and the cabbages at the end, not at the
4 beginning.

5 All right. Here is what Dr. Shamos
6 testified about yesterday. This is CompuServe Mall in
7 front of the PTO during the prosecution of the '314
8 patent, okay?

9 All right. Here's two more pieces --
10 three more pieces of CompuServe Mall art in front of the
11 PTO during the '314 reexamination.

12 Here's one, two, three pieces of
13 CompuServe Mall art in front of the PTO during the
14 original -- I'm sorry -- during the '492 reexamination.
15 Here's the fourth piece.

16 And there's the three pieces of
17 CompuServe Mall information before the PTO during the
18 '639 patent.

19 They tried to run -- not these folks, but
20 amazon.com tried to run the argument that the PTO -- to
21 the PTO that the two patents -- all three patents -- two
22 patents, '314, '492, should have been invalidated over
23 this art. The PTO didn't buy it.

24 So now they're trying to run the same
25 argument before you folks. It's not clear and

1 convincing evidence on this point.

2 Customer action. We got back to the
3 customer action again. I would just remind you what
4 Dr. Grimes testified to repeatedly. The system claims
5 don't require a customer to do anything. They are on
6 the Newegg site.

7 You've got Mr. Sayles' argument to you.
8 That's not what the claims cover.

9 Is the customer computer part of the
10 system? Absolutely.

11 Was the system designed to include the
12 customer computer? Absolutely.

13 Does the customer have much choice to do
14 anything other than follow the system once you're in the
15 system? Absolutely not.

16 Mr. Tittel. Now, I mean no disrespect to
17 Mr. Tittel, but you have to go back there and
18 essentially decide whether you're going to do what
19 Mr. Sayles wants you to do, told you you should do on
20 the verdict on infringement and validity based on
21 Mr. Tittel.

22 I would suggest to you, be cautious.
23 Here's why. The big round and round circle chart that
24 they're so proud of about the way that supposedly
25 operates, well, this is the testimony that Dr. Grimes

1 relied on from Mr. Wu about whether it took place in two
2 steps -- remember, their big argument, both things move
3 around and drop in at the same time.

4 Well, that's not what Mr. Wu testified
5 to. Mr. Wu testified that there are two steps. It's
6 right there. Then we go through the second step with
7 this ID. That's the testimony that Dr. Grimes -- I'm
8 sorry. I keep doing this. I have a very good friend
9 whose name is Dr. Grimes.

10 That's the testimony that was cited
11 during our presentation. That's not the testimony that
12 Mr. Tittel is relying upon. So you have got to be
13 cautious. Mr. Tittel is not relying on what Mr. Wu
14 testified to as to how the system runs.

15 Now, there are some other issues with
16 Mr. Tittel that, again, I would caution you about.
17 Mr. Tittel and his own client aren't in agreement.
18 Remember this back and forth about his html programming?

19 Question: Mr. Tittel, html is not
20 considered a programming language. The claim says
21 programming, not programming language.

22 But look at what Mr. Wu says. In your
23 experience, is there any relationship to the job you had
24 in developing an E-commerce?

25 Answer: All of the programming, already

1 I have experience. Web server, html.

2 You see it? Mr. Wu considers html to be
3 programming. Mr. Tittel doesn't.

4 There's more. Mr. Tittel says: Well,
5 you can just look at a book, read it, and you can figure
6 out what's going on under the hood with respect to the
7 software.

8 I asked Mr. Wu the same thing on cross,
9 and I said: You look at the website -- I'm sorry. It
10 wasn't me. It was Mr. Sayles.

11 Question: Does that tell you anything
12 about the source code?

13 Answer: No. Just major -- several steps
14 adding-to-cart, checkout, browsing. That's just the use
15 case.

16 But the first answer is the one that
17 counts, no.

18 Tittel going left; Wu going right.

19 The database. Did the books on
20 CompuServe disclose a shopping cart database connected
21 to a shopping cart computer?

22 Mr. Tittel says: Yes, they do.

23 Mr. Trevor, boy, he's not in agreement
24 with that. As I said, those books don't -- they're not
25 implementation guides.

1 Messaging. Same thing. Are the
2 limitations of this clause set forth in the CompuServe
3 books? Yes, they are.

4 Back comes Mr. Trevor. He's the
5 CompuServe expert. What did Mr. Trevor say? I
6 didn't -- it doesn't say that, no.

7 Shopping cart. The personal holding file
8 is on the server, and that's where we find our shopping
9 cart.

10 Back comes Mr. Trevor, well, document
11 doesn't address implementation.

12 And Dr. Shamos testified that, yeah,
13 there's a shopping cart file, but it's not in the
14 database. It's in the mainframe.

15 Remember that? That was just yesterday
16 afternoon. It's got to be in the database. If it's not
17 in the database, it's in the mainframe.

18 And then I can't take credit for the
19 title, and it's not meant to be disrespectful, but the
20 Tale of Two Tittels, he's not even agreeing with
21 himself.

22 Do you think you know more about what
23 CompuServe has implemented than Mr. Trevor?

24 First answer: Absolutely not, sir.

25 Second answer: I'm just asking whether

1 you think you can find things that Mr. Trevor can't?

2 Yes.

3 I want to just leave you with some
4 thoughts.

5 Mr. Treese: I'm proud of my work.

6 Question: Why?

7 Answer: That work and the work at Open
8 Market influenced the evolution of doing business in the
9 software that we used for it on the internet.

10 Question: Mr. Ghosh, do you have an
11 opinion as to the value?

12 Answer: No.

13 Question: The shopping cart?

14 Answer: No. It's one of the pieces
15 that's necessary. It's hard to imagine someone doing
16 shopping without some functionality like that.

17 This is the spark plug in the engine of
18 Newegg's entire business.

19 Question: Do you have any opinion as to
20 the value of the methods?

21 Answer: It's critical. So without
22 state, it's really hard to imagine how you could conduct
23 conduct -- excuse me -- conduct commerce, or for that
24 matter, anything of any value.

25 Ms. Wolanyk. We were listing out all of

1 the various people who are licensed.

2 Question: Is the company that you still
3 believe is using your technology without permission and
4 isn't willing to pay for Newegg?

5 Answer: Correct.

6 And, Ladies and Gentlemen, this is a
7 professional person running a major company. We're not
8 asking you to give her company a verdict under the law
9 and the facts just because you like her.

10 Question: Mr. Bakewell, at the
11 hypothetical negotiation, Newegg's only option is to
12 take a patent license, right?

13 Answer: That's right.

14 You got Mr. Sayles again coming back up
15 and saying: Oh, heck, they could have taken a software
16 license.

17 THE COURT: You have about two minutes
18 left.

19 MR. ADAMO: Understood, Your Honor.

20 Well, that's not what Mr. Bakewell says.
21 That's not what you can do in the hypothetical
22 negotiation. You have to take a patent license, not a
23 software license.

24 So you keep hearing about this confession
25 and avoidance about software licenses. And let me back

1 up just one second. I want to say a few more words
2 about Mr. Bakewell.

3 Remember Mr. Satine, with Mr. Bakewell,
4 trying to get Mr. Bakewell to talk about the book of
5 wisdom and knowing what you would know in 2001, like the
6 point -- the 85-cent-per-transaction license, the Odimo
7 license and projecting forward?

8 Nobody starts a major business without
9 doing forward projections. By the time this lawsuit
10 came up, there simply weren't the documents available,
11 as Mr. Nawrocki testified, okay?

12 Mr. Sayles comes back on redirect, and
13 all of a sudden, out of the blue, we've got Mr. Bakewell
14 agreeing that, oh, yeah, the book of wisdom, seven to
15 nine later, later data might be considered, but along
16 with, within the context of other contemporaneous data.

17 That's exactly our point. You do look
18 forward, you do look at their projections, and you do
19 look at what they have done now. And you would have
20 done it then. It took his own lawyer to get
21 Mr. Bakewell to admit what he should have admitted
22 straight out to Mr. Satine.

23 Last point on the numbers. Here's
24 Newegg's position. Sovereign damages of half a million,
25 .2 percent of Newegg's projected/incremental profit of 6

1 percent, .0125 percent of Newegg's accused sales of --
2 that number is so big, I'm not even going to read it.
3 It's 4 billion and 700 whatever.

4 Newegg keeps 98.8 (sic) percent of its
5 profits. Here's what our position is: 33,979,805. Is
6 it a lot of money? Yes, because of their use. That's
7 10 percent of their projected/incremental profit of 6
8 percent, .7 percent of the 4,000,794,000, and it's 90
9 percent of the profit.

10 Without this invention driving that
11 engine, there wouldn't be any profit.

12 Right to the beginning.

13 Last point. Now I'm going to tell you
14 the story. The old story of the cabbages and the goat.
15 Because as I've looked back at the defense here, this is
16 what the book is like.

17 Here's the story. The owner of a cabbage
18 patch sued a neighbor for common-law trespass and
19 conversion. Her single and simple assertion was that
20 the neighbor's goat ate her cabbages.

21 The neighbor responded with several
22 defenses. You don't have any cabbages. If you did have
23 cabbages, they weren't eaten. If they were eaten, it
24 wasn't by a goat. If they were eaten by a goat, it
25 wasn't my goat. And if it was my goat, the goat was

1 insane.

2 We don't infringe, but if we do infringe,
3 the patent is not valid; but if the patent -- if we
4 infringe and the patent is valid, we don't owe you any
5 money.

6 We thank you very much for spending four
7 days of your week with us. My client, my colleagues, my
8 partners, all of the people that you don't -- you
9 haven't seen, we really, really, really appreciate your
10 sitting as our jury here. We know you will follow His
11 Honor's instructions.

12 We know, from seeing you, that you've
13 taken this all very seriously. You've taken your oath
14 as a juror very seriously.

15 I don't want help. I want you to take
16 the evidence we've presented with His Honor's reading of
17 the law, and I want you to go back, and I want you to
18 deliberate; and I'm hopeful that when you do, my
19 suggestions as to how to fill the verdict form out will,
20 when you make your minds up, not from me telling you,
21 will be how you judge the case.

22 I thank you very, very much.

23 Your Honor, that completes my closing.

24 THE COURT: Thank you, Mr. Adamo.

25 All right, Ladies and Gentlemen of the

1 Jury. You've heard the opening statements, all the
2 evidence, the charge, the closing arguments, and so now
3 it's time for you to retire to the jury room to begin
4 your deliberations.

5 Your first action should be to elect your
6 foreperson, and then you should decide how you wish to
7 proceed.

8 Sandwiches have been brought in for you.
9 You may want to take 30 minutes and just eat and not
10 talk about the case or you may want to get right into
11 it. That, again, will be up to you.

12 If you want to take a break, go outside,
13 or for whatever reason, just send me a note, let me know
14 what you'd like to do. I'll respond, telling you that
15 that will be fine.

16 Deliberate. Take a break. We're on your
17 schedule at this point, so you let us know what we can
18 do for you.

19 If you need anything, any other drinks or
20 snacks or anything of that nature, please let us know.

21 Thank you again for your very attentive
22 attitude throughout the course of the trial and during
23 closing argument. At this time, you are excused to the
24 jury room to begin your deliberations.

25 COURT SECURITY OFFICER: All rise for the

1 jury.

2 (Jury out.)

3 THE COURT: Please be seated.

4 All right. Anything further from the

5 Plaintiff?

6 Anything further from the Defendant?

7 MR. ADAMO: No, Your Honor.

8 MR. SAYLES: No, Your Honor.

9 THE COURT: All right. Very well-trying
10 case on both sides. We'll be in recess awaiting the
11 jury's verdict.

12 COURT SECURITY OFFICER: All rise.

13 (Jury deliberations.)

14

15 (Jury out.)

16 COURT SECURITY OFFICER: All rise.

17 THE COURT: Please be seated.

18 All right. The Court has a note from the

19 jury, Juror Note No. 2, and it says: Is inducement the

20 same as indirect infringement?

21 And the Court would propose to answer --

22 the Court would propose to answer: Inducement is a type

23 of indirect infringement.

24 Is there any objection?

25 MR. SAYLES: There is no objection, but

1 we would request that you -- that you simply add that
2 that they should review the Court's instructions and
3 continue their deliberations.

4 THE COURT: Okay.

5 MR. ADAMO: I'm fine with that, Your
6 Honor.

7 THE COURT: With what he's suggesting?

8 MR. ADAMO: Yes, sir. Otherwise, no
9 objection.

10 THE COURT: Okay.

11 MR. ADAMO: And I guess that would be
12 4.2, Your Honor.

13 THE COURT: 4.2?

14 MR. ADAMO: 4.2, yes.

15 THE COURT: Defendants agree?

16 MR. SAYLES: Yes.

17 THE COURT: Okay. I'm not going to tell
18 them to continue their deliberations. I think they know
19 that, but -- all right.

20 We'll be in recess.

21 MR. SAYLES: Judge, would you tell us who
22 signed it?

23 THE COURT: Yes.

24 Who signed that, Ms. Ferguson?

25 COURTROOM DEPUTY: Kristi Develin.

1 THE COURT: Who?

2 COURTROOM DEPUTY: Kristi Develin.

3 THE COURT: Kristi Develin. Which one is
4 she, right front?

5 MR. BALDAUF: She's the one that was
6 asking questions during the --

7 THE COURT: Okay. Thank you.

8 All right, Ms. Ferguson.

9 Counsel approach the bench, if you would.

10 THE REPORTER: Is this on the record?

11 THE COURT: No. It's off the record.

12 (Bench conference off the record.)

13 (Court in recess.)

14 (Jury deliberations continue.)

15 (Jury out.)

16 COURT SECURITY OFFICER: All rise.

17 THE COURT: Please be seated.

18 All right. I've been informed we have a
19 verdict. Is there anything before I bring the jury in?

20 MR. SAYLES: No, Your Honor.

21 MR. ADAMO: No, Your Honor.

22 THE COURT: All right. You may bring the
23 jury in.

24 COURT SECURITY OFFICER: All rise for the
25 jury.

1 (Jury in.)

2 THE COURT: Please be seated.

3 All right. I understand that you've
4 reached a verdict; is that correct?

5 THE FOREPERSON: (Nods head.)

6 THE COURT: All right. If you'll hand
7 the verdict to the court security officer, please.

8 THE FOREPERSON: (Complies.)

9 THE COURT: All right. Ms. Ferguson, if
10 you will, please read the verdict.

11 COURTROOM DEPUTY: In Case
12 No. 6:07-CV-511, Soverain versus Newegg, verdict.

13 Under infringement, as to direct
14 infringement on the '314 patent and the '492 patent, the
15 answer is no.

16 Under inducement, as to the '314 patent
17 and the '492 patent, all the answers are yes.

18 On Question No. 2, as to the '639 patent,
19 as to Claim 60 and 79, the answer is no.

20 Under invalidity, as to the '314, the
21 '492, and the '639 patent, the answer is all no as to
22 all claims.

23 Under damages, the answer to Question No.
24 4 is 2 million 500 dollars (sic) as to patent '134 or
25 the '492 patent.

1 As to the '639 patent, the answer is
2 zero, signed and dated by the jury foreperson.

3 THE COURT: All right. Thank you,
4 Ms. Ferguson.

5 Is there any request to poll the jury?

6 MR. ADAMO: Yes, Your Honor, please.

7 THE COURT: All right. All members of
8 the jury who that represents your verdict, as
9 Ms. Ferguson just read it, if you will please stand.

10 (All jurors stand.)

11 THE COURT: All right. Thank you. You
12 may be seated.

13 All right. Members of the Jury, first,
14 the Court wants to thank you for your service here this
15 week. You have all worked extremely hard. It's been a
16 long, tedious case. You've listened intently, and you
17 provided a valuable public service, which is critical to
18 the administration of justice guaranteed under our
19 Constitution.

20 Without your patient and humble service,
21 these guarantees could not be met, and the Court thanks
22 you for your service.

23 You have now completed your service. You
24 have previously been instructed by me not to discuss
25 this case with others, including your family and

1 co-workers. You are now relieved from that constraint.

2 You are now allowed to discuss this case
3 and your experiences as a juror with whomever you wish.
4 However, you should never feel as if you are required to
5 discuss your experience. Your privacy is valuable and
6 should never be jeopardized by your service, so don't
7 ever feel as if you are required to discuss your
8 experience if you don't wish to.

9 To that end, I have instructed the
10 attorneys in this case and now instruct them not to
11 contact you in any manner.

12 I have also instructed the attorneys that
13 any of your personal information that was given to them
14 at the beginning of the case is to be returned to the
15 Court. This information will promptly be shredded, as
16 will your juror notepads.

17 If you are contacted in any way by the
18 attorneys or their staff, please contact me immediately.

19 In addition, you should never feel
20 required to answer to anyone about your service. If you
21 ever feel harassed or pressured to speak about any
22 portion of your service during this case, please feel
23 free to contact me.

24 You are to be commended for your
25 honorable service throughout this trial. I thank you

1 again, and you are dismissed to the jury room. If you
2 will wait there, someone will be there to finally
3 dismiss you in just a moment.

4 The jury is excused at this time.

5 COURT SECURITY OFFICER: All rise for the
6 jury.

7 (Jury out.)

8 THE COURT: Please be seated.

9 All right. The Court prefers to resolve
10 all post-trial issues before entering a final judgment.
11 Accordingly, the Court orders all post-verdict motions
12 to be filed by May 24th; responses are due by June the
13 7th; replies by June 14th; and surreplies by June 21.

14 The Court sets all post-verdict motions
15 for hearing on Tuesday, June 29th at 9:00 a.m.

16 Additionally, the Court orders that if a
17 party files more than one motion -- well, this will be
18 in my written order. I'll enter a written order. I
19 just have some page limitations on all those motions.

20 Now, you know, it's pretty obvious to me
21 that this jury just settled y'all's case for you, which
22 you could have done last week very easily and less
23 expensively than you have -- all of you being here in
24 trial this week and everybody worrying about what was
25 going to happen.

1 So I, again, encourage you, you know,
2 settlement is a hallmark of our system. If every case
3 went to trial, you know, it's just -- it's a bad thing
4 when cases have to go all the way to trial when there's
5 a reasonable basis to settle it. And if there's not a
6 reasonable basis, you shouldn't.

7 Who is y'all's mediator in this case?

8 MS. WOLANYK: Mike Patterson.

9 THE COURT: All right. Would y'all like
10 to go back -- I'm going to send you back to mediation.

11 Would you like to go back to
12 Mr. Patterson, or do you have someone else that either
13 side would prefer?

14 MR. CHENG: Mr. Patterson.

15 MS. WOLANYK: Mike Patterson is fine.

16 THE COURT: Mr. Patterson?

17 All right. I'm going to ask you, within
18 the next -- well, I will say by May 24th, which is when
19 post-verdict motions are due. But that's going to cost
20 everybody another hundred thousand dollars, you know, in
21 attorneys' fees.

22 So get your heads together, get with
23 Mr. Patterson, see if you can work out a practical
24 business solution to this problem, and see if we can
25 make it go away.

1 If not, I'll have a hearing on the 29th.
2 We'll enter judgment. It can go to the Fed Circuit,
3 whoever wants to spend the money to appeal it; and we'll
4 come back and try it again, okay?

5 Yes?

6 MR. CHENG: Your Honor, I hope this is
7 not inappropriate; but even taking what you just said
8 into account about settlement, I just want to say that,
9 you know, we're very thankful for your time and
10 attention to this case; and that I've been practicing
11 law for about 13 years, and this is the first time I
12 have felt like a real lawyer --

13 THE COURT: Thank you. I appreciate that
14 very much. Very kind of you, Mr. Cheng.

15 All right. Very well. Good job on both
16 sides.

17 Mr. Adamo?

18 MR. ADAMO: I just -- it's 2,500,000?

19 THE COURT: Uh-huh. I believe that's
20 right, isn't it?

21 And I think you said 2 million 500.

22 COURTROOM DEPUTY: Yes, 2,500,000.

23 THE COURT: We don't talk in less than
24 thousands around here.

25 [Laughter]

1 MR. ADAMO: That's what I wrote down, but
2 I just wanted to make sure.

3 THE COURT: All right. You're correct.

4 All right. Very well.

5 Anything further?

6 All right. Everyone have a good weekend.

7 We're adjourned.

8 COURT SECURITY OFFICER: All rise.

9 (Court adjourned.)

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1 C E R T I F I C A T I O N

2

3 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled
5 matter.

6

7 /s/

8 SHEA SLOAN, CSR, RPR

9 OFFICIAL COURT REPORTER

10 STATE OF TEXAS NO. 3081

11

12

13 /s/

14 JUDITH WERLINGER, CSR

15 DEPUTY OFFICIAL COURT REPORTER

16 STATE OF TEXAS NO. 267

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